Supreme Court, U.S.
FILED

05-139 JUL 25 2005

OFFICE OF THE CLERK

No. ____

IN THE

Supreme Court of the United States

MARICOPA COUNTY, a public entity, and
MARICOPA COUNTY CORRECTIONAL HEALTH SERVICES,
a division of Maricopa County,
Petitioners,

v.

CAROL ANN AGSTER, personal representative of the
Estate of Charles J. Agster, III, *et al.*,
Respondents.

**Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

DUANE A. OLSON *
DANIEL P. JANTSCH
MICHAEL D. WOLVER
OLSON, JANTSCH & BAKKER, P.A.
7243 North 16th Street
Phoenix, Arizona 85020
(602) 861-2705

JOSEPH D. KEARNEY
APPELLATE CONSULTING GROUP
Post Office Box 2145
Milwaukee, Wisconsin 53201
(414) 332-0966

* Counsel of Record

Attorneys for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether privilege or any similar precept may protect medical peer reviews from discovery in federal courts?

PARTIES TO THE PROCEEDING BELOW

Petitioners, defendants-appellants below, are Maricopa County, a political subdivision of the State of Arizona, and its Department of Correctional Health Services. Because neither is a "nongovernmental corporation," no Rule 29.6 statement is required.

Respondents, plaintiffs-appellees below, are Carol Ann Agster, both as personal representative of the Estate of Charles J. Agster, III, deceased, and as a surviving parent of Charles J. Agster, III, and Charles J. Agster, Jr. as a surviving parent of Charles J. Agster, III.

Additional defendants, not participants in the appeal below, are, as denominated in the district court by respondents, the Maricopa County Sheriff's Office, a division of Maricopa County; Joseph M. Arpaio, Maricopa County Sheriff; Betty J. Lewis and John Doe Lewis, her husband; Baruch A. Reusch and Jane Doe Reusch, his wife; Leah R. Compton and John Doe Compton, her husband; Kristine Kemper and James E. Crouch, her husband, aka John Doe Kemper; Amanda S. Garrison and John Doe Garrision, her husband; Susan E. Fisher and John Doe Fisher, her husband; Eric Nulph and Jane Doe Nulph, his wife; Katherina Brokschmidt and Charles Brokschmidt, her husband, aka John Doe Brokschmidt; Michael C. Wilkins and Kathleen Wilkins, his wife, aka Jane Doe Wilkins; Laura Sodeman and John Doe Sodeman, her husband; and John Does I-X and Jane Does I-X.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING BELOW	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	6
CONCLUSION	15

TABLE OF AUTHORITIES

CASES	Page
Adkins v. Hospital Authority, 2004 U.S. Dist. LEXIS 23010 (M.D. Ga. Nov. 10, 2004)	9
Bredice v. Doctors Hospital, Inc., 50 F.R.D. 249 (D.D.C. 1970), *aff'd mem.*, 479 F.2d 920 (D.C. Cir. 1973)	*passim*
Brem v. Drs. DeCarlo, Lyon, Hearn and Pazourek, P.A., 162 F.R.D. 94 (D. Md. 1995)	9
Gillman v. United States, 53 F.R.D. 316 (S.D.N.Y. 1971)	9
Holland v. Muscatine Gen. Hosp., 971 F. Supp. 385 (S.D. Iowa 1997)	9
Jaffee v. Redmond, 518 U.S. 1 (1996)	5, 6, 12, 13
Johnson v. Nyack Hosp., 169 F.R.D. 550 (S.D.N.Y. 1996)	9
LeMasters v. Christ Hosp., 791 F. Supp. 188 (S.D. Ohio 1991)	9
Marshall v. Spectrum Med. Group, 198 F.R.D. 1 (D. Me. 2000)	9
Memorial Hospital v. Shadur, 664 F.2d 1058 (7th Cir. 1981)	7
Nilavar v. Mercy Health Sys., 210 F.R.D. 597 (S.D. Ohio 2002)	9
Poliner v. Texas Health Sys., 201 F.R.D. 437 (N.D. Tex. 2001)	7-8
Spinks v. Children's Hosp. Nat'l Medical Center, 124 F.R.D. 9 (D.D.C. 1989)	8
Swidler & Berlin v. United States, 524 U.S. 399 (1998)	6, 12
Syposs v. United States, 179 F.R.D. 406 (W.D.N.Y. 1998), *adhered to on reconsid.*, 63 F. Supp. 2d 301 (1999)	9
Trammel v. United States, 445 U.S. 40 (1980)	6, 11

TABLE OF AUTHORITIES—Continued

	Page
Tuscon Medical Center v. Misevech, 113 Ariz. 34, 545 P.2d 958 (1976)	13-14
United States v. Gillock, 445 U.S. 360 (1980)	6
United States v. Harris Methodist Fort Worth, 970 F.2d 94 (5th Cir. 1992)	7, 8
United States v. Weber Aircraft Corp., 465 U.S. 792 (1984)	11
University of Pennsylvania v. EEOC, 493 U.S. 182 (1990)	5, 6, 7
Upjohn Co. v. United States, 449 U.S. 383 (1981)	6, 14-15
Utterback v. United States, 121 F.R.D. 297 (W.D. Ky. 1987)	9
Virmani v. Novant Health Inc., 259 F.3d 284 (4th Cir. 2001)	7, 10
Weekoty v. United States, 30 F. Supp. 2d 1343 (D.N.M. 1998)	9
STATUTES AND RULES	
28 U.S.C. § 1254(1)	2
Ariz. Rev. Stat. § 36-445.01	3
Ariz. Rev. Stat. § 36-2403	3
Fed. R. Evid. 501	2, 11, 12, 15
Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101-11152	5, 10, 11
Supreme Court Rule 10(c)	6
MISCELLANEOUS	
Alissa Marie Bassler, *Federal Law Should Keep Pace with States and Recognize a Medical Peer Review Privilege*, 39 Idaho. L. Rev. 689 (2003)	13

TABLE OF AUTHORITIES—Continued

	Page
David P. Leonard, *The New Wigmore: Selected Rules of Limited Admissibility* (2002)	13
Moore's Federal Practice (3d ed. 2005)	13
Susan O. Schuetzow, *State Medical Peer Review: High Cost But No Benefit—Is It Time for a Change?*, 25 Am. J. L. & Med. 7 (1999)	12
Katherine T. Stukes, *The Medical Peer Review Privilege After* Virmani, 80 N.C. L. Rev. 1860 (2002)	13

IN THE

Supreme Court of the United States

No. ___

MARICOPA COUNTY, a public entity, and
MARICOPA COUNTY CORRECTIONAL HEALTH SERVICES,
a division of Maricopa County,
Petitioners,

v.

CAROL ANN AGSTER, personal representative of the
Estate of Charles J. Agster, III, *et al.*,
Respondents.

**Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Maricopa County and its Department of Correctional Health Services, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, *see infra* Appendix to Petition ("Pet. App.") 1a–5a, is reported at 406 F.3d 1091 (9th Cir. 2005). The order of the district court, Pet. App. 6a–7a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 2004. Pet. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

This case presents a question under Federal Rule of Evidence 501, which Congress enacted. Rule 501 provides in relevant part as follows:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. . . .

STATEMENT

This case presents an important and unsettled question concerning privileges in federal courts. Virtually all of the states have recognized some form of a medical peer review privilege. Numerous federal courts have done so as well, by following Federal Rule of Evidence 501's directive to apply "reason and experience" with respect to questions of privilege. The Ninth Circuit here nonetheless rejected such a privilege, erroneously crediting Congress's failure to do so in a particular federal statute.

To place the issues in this case in context, it is necessary to set forth (1) the medical peer review requirements to which petitioners and other accredited correctional health providers throughout the nation are subject, insofar as they are relevant here, and (2) the proceedings in the district court and the court of appeals.

1. The Requirements Governing the Preparation of Mortality Reviews by Correctional Health Providers. Through its Department of Correctional Health Services ("CHS"), Maricopa County provides medical care for incarcerated individuals in the Maricopa County correctional facilities. CHS is subject to regulation by the State of Arizona and is accredited by the National Commission on Correctional Health Care ("NCCHC").

The NCCHC promulgates various standards that correctional health providers must follow in order to retain their accreditation. One such standard is No. J-10, which requires both that CHS have a written policy with defined procedures for mortality reviews in the event of the death of an inmate and that, in actual practice, these reviews be carried out. This standard was implemented by CHS through its Policy No. 00-10.0. The express goals of this policy, consistent with NCCHC standard No. J-10, include determining whether appropriate interventions were undertaken in the events immediately surrounding the death, whether there was a pattern of symptoms that might have resulted in earlier diagnosis and intervention, and whether there are emerging patterns when compared with other inmate deaths. Furthermore, all mortality reviews are to remain confidential and privileged based, at least in part, upon the peer review privileges set forth in Arizona Revised Statutes § 36-445.01 and § 36-2403. The result of each mortality review is a written report denominated a Critical Incident Review.[1]

2. Proceedings in This Case. This case commenced in state court on August 6, 2002, with respondents alleging, among other things, that CHS and other entities and individuals were liable in negligence and under federal civil rights law for the death of Charles J. Agster, III, while in a

---

[1] For the sake of consistency, the review will be referred to simply as a "mortality review."

Maricopa County correctional facility. The case was removed to federal court on the basis of federal-question and supplemental jurisdiction.

As part of the discovery process, respondents sought a number of documents related to Agster's death. One was a report that the defendant Sheriff's office prepared as a result of its own extensive investigation of the facts and circumstances surrounding Agster's death. This report was produced to respondents.

Respondents also sought production of the mortality review CHS conducted as a result of Agster's death. At the time of this discovery request by respondents, they had already obtained *underlying* information available to the peer review committee that had conducted the mortality review. In particular, respondents had received in discovery a videotape from the jail, Agster's CHS medical records, and records of interviews of two CHS nurses.

Petitioners resisted discovery of the mortality review itself on the ground that it was privileged as a peer review document. The district court thereupon granted a motion by respondents to compel production of the mortality review. Pet. App. 6a. In doing so, the court stated that "no federal peer review privilege has been adopted in the Ninth Circuit." *Id.* at 7a.

Petitioners appealed to the Ninth Circuit, which found jurisdiction under the *Cohen* collateral-order doctrine. *See* Pet. App. 3a (28 U.S.C. § 1291 grants jurisdiction over district court orders that "'conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgment'") (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). In explaining this basis for jurisdiction, the court of appeals observed that "[t]he issue is important" and noted that "the

statutory grant of the claimed privilege by Arizona and other states [so] attests." Pet. App. 4a.

The court explained as well that it had the authority to "create a new privilege as a matter of federal common law." *Id.* The touchstone for any such determination is whether there is "[a] 'public good transcending the normally predominant principle' disfavoring testimonial privileges." *Id.* (quoting *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996)).

The Ninth Circuit nonetheless declined to recognize the existence of a medical peer review privilege; the court felt itself "constrained by two considerations, one general and the other particular to this case." *Id.* at 4a. The "general" constraint was that the court viewed this as a situation "'where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself.'" *Id.* (quoting *University of Pennsylvania v. EEOC*, 493 U.S. 182, 189 (1990)). The basis for this view was the Health Care Quality Improvement Act of 1986 (HCQIA), which "granted immunity to participants in medical peer reviews, but did not privilege the report resulting from the process," Pet. App. 4a–5a (citing 42 U.S.C. §§ 11101–11152); Congress also did not specify a statutory privilege when it amended the act in 1987. Pet. App. 5a.

The "particular" constraint identified by the court of appeals is "that the privilege is sought to protect a report bearing on the death of a prisoner." *Id.* The court stated that "[i]n these circumstances, it is peculiarly important that the public have access to the assessment by peers of the care provided." *Id.*

On this reasoning, the Ninth Circuit affirmed the order of the district court compelling production of the mortality review.

REASONS FOR GRANTING THE PETITION

On at least six occasions in the past twenty-five years, this Court has decided a case where the existence or scope of an evidentiary privilege in federal court was deemed an important issue. *Swidler & Berlin v. United States*, 524 U.S. 399 (1998) (considering attorney-client privilege); *Jaffee v. Redmond*, 518 U.S. 1 (1996) (psychotherapist-patient privilege); *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990) (academic-peer review privilege); *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (attorney-client privilege); *United States v. Gillock*, 445 U.S. 360 (1980) (legislative privilege); *Trammel v. United States*, 445 U.S. 40 (1980) (spousal testimonial privilege). Although in some instances in granting review the Court has noted a conflict in the courts of appeals, *see Jaffee*, 518 U.S. at 7–8; *Gillock*, 445 U.S. at 361–62, this is not always the case, *see Trammel*, 445 U.S. at 41–42. Rather, the common aspect supporting certiorari in all these cases has been that the question of privilege presented has been important. *See, e.g., Jaffee*, 518 U.S. at 8 (noting "the importance of the question"); *Upjohn Co.*, 449 U.S. at 386 ("We granted certiorari in this case to address important questions . . . ."). *See also University of Pennsylvania*, 493 U.S. at 188 (in explaining grant of certiorari, intimating that there was no true conflict in the courts of appeals, but noting "the importance of the issue"). *Compare* Sup. Ct. R. 10(c) (certiorari may be appropriate "where a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court").

The question presented here is sufficiently controverted and important to warrant this Court's review. Specifically, the lower federal courts would benefit substantially from a determination by this Court of whether there is in federal court a self-critical analysis privilege in the medical peer

review context. The matter is not approached uniformly in the federal courts; this is so even though a privilege exists in almost every state and has strong support in commentary on the law. These matters are developed below.

First, there is scarcely uniformity in the federal courts. Even within the courts of appeals, there is some disagreement on this discovery issue. On the one hand, the Fourth Circuit in *Virmani v. Novant Health Inc.*, 259 F.3d 284 (4th Cir. 2001), concluded that no federal medical peer review privilege would be recognized in a racial and national origin discrimination lawsuit. Similarly, the Seventh Circuit rejected the privilege in *Memorial Hospital v. Shadur*, 664 F.2d 1058 (7th Cir. 1981), an antitrust case. And the Ninth Circuit here also found no privilege, although it implied that the result might have been different if the case had not involved an incarcerated individual. *See supra* p. 5 (quoting Pet. App. 5a).

On the other hand, the Fifth Circuit has endorsed the concept of a medical peer review privilege. Specifically, it has stated that, "[u]nlike the privilege claim for faculty tenure decisions rejected in *University of Pennsylvania v. EEOC*, as well as potential analogous claims by 'writers, publishers, musicians, [and] lawyers,' 493 U.S. at 194, the medical peer review process 'is a *sine qua non* of adequate hospital care.'" *United States v. Harris Methodist Fort Worth*, 970 F.2d 94, 103 (5th Cir. 1992) (quoting *Bredice v. Doctors Hospital, Inc.*, 50 F.R.D. 249, 250 (D.D.C. 1970), *aff'd mem.*, 479 F.2d 920 (D.C. Cir. 1973)). The nature of the case meant that the court could go on to say that it "need not *define* the scope of any applicable privilege," *id.* (emphasis added), but there can be no doubt that *Harris Methodist* and the protection from discovery that it contemplates for medical peer reviews are the law within the Fifth Circuit. *See Poliner v. Texas Health Sys.*, 201 F.R.D. 437, 438 (N.D. Tex. 2001)

(suggesting that there is no federally recognized privilege per se, but citing *Harris Methodist* and on its basis limiting access in discovery to medical peer review materials).

At the district court level (the sole but significant arena for most privilege and other discovery disputes), the level of disagreement is even clearer. The leading case recognizing a self-critical analysis privilege in the medical peer review context is *Bredice*, upon which *Harris Methodist* relied. *Bredice* was a medical malpractice action in which plaintiffs sought the production of any internal evaluations prepared by the defendant hospital in connection with the death of Frank Bredice. After an in-depth consideration of the reasons for a hospital's engaging in such self-critical analysis relative to medical care, the court concluded that "[t]here is an overwhelming public interest in having those staff meetings held on a confidential basis so that the flow of ideas and advice can continue unimpeded." *Bredice*, 50 F.R.D. at 251. The court accordingly held that "[t]hese committee meetings, being retrospective with the purpose of self-improvement, are entitled to a qualified privilege on the basis of this overwhelming public interest." *Id.* It is clear that *Bredice*, though a district court decision, constitutes the law of the D.C. Circuit. *See Spinks v. Children's Hosp. Nat'l Medical Center*, 124 F.R.D. 9, 10–12 (D.D.C. 1989) (federal medical malpractice case citing *Bredice* and denying motion to compel production of minutes of morbidity and mortality conference).

Even excluding district courts encompassed within the circuit courts of appeals discussed above (the D.C., Fourth, Fifth, Seventh, and Ninth), one cannot find consistency among the district courts with respect to the qualified privilege set forth in *Bredice*. Some have concluded that a federal medical peer review privilege prevented the dis-

closure of particular information.[2] Others have ruled to the contrary, finding no federal peer review privilege.[3]

---

[2] *See, e.g., Adkins v. Hospital Auth.*, 2004 U.S. Dist. LEXIS 23010 (M.D. Ga. Nov. 10, 2004) (recognizing peer review privilege for hospital documents in civil rights action brought by a physician); *Weekoty v. United States*, 30 F. Supp. 2d 1343, 1345 (D.N.M. 1998) (federal medical malpractice case citing *Bredice* and other precedents and stating that self-critical analysis privilege "has been repeatedly recognized in the context of morbidity and mortality conferences conducted by physicians"); *Utterback v. United States*, 121 F.R.D. 297, 297–300 (W.D. Ky. 1987) (finding Veterans Administration Board of Investigation memorandum reviewing surgery at issue to be protected from discovery and quoting *Bredice* in process); *Gillman v. United States*, 53 F.R.D. 316 (S.D.N.Y. 1971) (federal question case quoting *Bredice* and holding that reports of hospital's board of inquiry and hospital's director investigating suicide of plaintiff's decedent were privileged). *See also Brem v. Drs. DeCarlo, Lyon, Hearn & Pazourek, P.A.*, 162 F.R.D. 94, 101–02 (D. Md. 1995) (pre-*Virmani* case in Fourth Circuit noting that court in federal-question action was not *required* to apply Maryland's statutory medical peer review privilege but, citing *Bredice* and other cases, determining nonetheless to follow state statute).

[3] *See, e.g., Nilavar v. Mercy Health System*, 210 F.R.D. 597, 601–09 (S.D. Ohio 2002) (discussing precedents at length and declaring *Bredice* not "persuasive[e]" and thus rejecting federal peer review privilege in antitrust action) (quotation at 603); *Marshall v. Spectrum Med. Group*, 198 F.R.D. 1 (D. Me. 2000) (declining under Fed. R. Evid. 501 to recognize Maine's peer review privilege in anesthesiologist's action asserting federal ADA claim and seven state law claims); *Syposs v. United States*, 179 F.R.D. 406 (W.D.N.Y. 1998) (rejecting *Bredice* and other cases and declining to recognize medical peer review privilege in Federal Tort Claims Act case), *adhered to on reconsid.*, 63 F. Supp. 2d 301 (1999); *Holland v. Muscatine Gen. Hosp.*, 971 F. Supp. 385, 390 (S.D. Iowa 1997) (stating that since "its genesis" in *Bredice* "[t]he self-critical analysis privilege [with respect to medical peer reviews] has had an ambiguous existence, neither uniformly adopted nor rejected," and declining to recognize privilege in case involving Title VII claim); *Johnson v. Nyack Hosp.*, 169 F.R.D. 550, 559–61 (S.D.N.Y. 1996) (ruling against privilege in racial discrimination lawsuit); *LeMasters v. Christ Hosp.*, 791 F. Supp. 188 (S.D. Ohio 1991) (declining to recognize privilege in sex discrimination and retaliation action).

Some of this variation can be explained by the different contexts of the cases—it is one thing, perhaps, to grant a privilege in the medical malpractice context (such as *Bredice*) and quite another to grant it in an antitrust or discrimination context. In the former instance, the concerns first enunciated in *Bredice* (that "[c]onstructive professional criticism [in retrospective care reviews] cannot occur in an atmosphere of apprehension that one doctor's suggestion will be used as a denunciation of a colleague's conduct in a malpractice suit," 50 F.R.D. at 250) are especially strong; in the latter instances, those concerns exist only to a lesser extent, and the information sought is not tangential but *direct* evidence of the claims themselves. In other words, in many of the cases *rejecting* a privilege the operative facts forming at least part of the bases for the claims (such as racial discrimination) are the peer review proceedings themselves.

This is not such a case, and, far more importantly for purposes of this Court's consideration, no such nuance exists in the Ninth Circuit's opinion. The Ninth Circuit was content to place great weight on the absence of an express medical peer review privilege in a federal statute (the Health Care Quality Improvement Act of 1986). *See supra* p. 5; Pet. App. 4a–5a. In fact, the court of appeals read far too much into Congress's approach. As more carefully explained by the Fourth Circuit in *Virmani*, Congress's concern in the HCQIA was in ensuring *both* that it encouraged medical peer review *and* that it did not discourage discrimination claims related to the peer review process (such as those in *Virmani*). *See Virmani*, 259 F.3d at 291–92. The latter concern does not exist at all in a case of the instant sort, where the claim is in the nature of medical malpractice—not, for example, discrimination in the peer review process—and thus the information as to which medical peer review privilege is contested is not some essential or even direct evidence of the underlying claim.

In these circumstances, it is apparent that in the HCQIA's treatment of peer reviews themselves Congress did nothing different from what it did in enacting Federal Rule of Evidence 501: it neither prescribed nor proscribed a particular privilege. It is instructive to recall briefly Congress's action with respect to this rule. In 1975, "the *proposed* provisions of the Federal Rules of Evidence governing privileges [were] rejected by Congress," *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 802 n.21 (1984) (emphasis added), which did not agree with the proposal of specifying nine privileges. Instead, Congress provided that "the federal courts [should] continue the *evolutionary* development of testimonial privileges . . . 'governed by the principles of the common law as they may be interpreted . . . in the light of reason and experience.'" *Trammel*, 445 U.S. at 47 (emphasis added) (quoting Fed. Rule Evid. 501). In short, "[i]n rejecting the proposed Rules and enacting Rule 501 . . . . , [Congress acted] to provide the courts with the flexibility to develop rules of privilege on a case-by-case basis and to leave the door open to change." *Id.* (internal quotation marks and citation omitted). Against this well-known and fixed backdrop, it is unreasonable to conclude that Congress, in enacting the HCQIA in 1986 and not explicitly including a privilege in the statute, meant to *deny* any privilege. Congress had set forth its basic approach in 1975 when it enacted Rule 501 directing the courts to develop privileges on a case-by-case basis.[4]

---

[4] The HCQIA formed the basis of the Ninth Circuit's "general objection" to recognizing a privilege here. Pet. App. 5a; *see supra* p. 5. The court's "particular objection"—*viz.*, "that the privilege is sought to protect a report bearing on the death of a prisoner" (Pet. App. 5a)—is rather extraordinary. The court explained its reasoning by stating that in the prison context "it is peculiarly important that the public have access to the assessment by peers of the care provided." *Id.* This suggests that the court viewed the district court's order compelling the production of the peer review document (and its affirmance of that order) as judicial

There is considerable basis in "reason and experience," Fed. R. Evid. 501, for recognizing a medical peer review privilege in particular contexts. Especially strong support for such a privilege is visible in the actions of the states, whose "policy decisions . . . bear on the question whether federal courts should recognize a new privilege." *Jaffee*, 518 U.S. at 12–13 (and cases cited). Just as in *Jaffee* the Court found the appropriateness of its decision "confirmed by the fact that all 50 States and the District of Columbia have enacted into law some form of psychotherapist privilege," *id.* at 12, so, too, is it relevant here that, "[t]o encourage [medical] peer review, almost all states . . . have made the deliberations and records of medical peer review privileged from judicial disclosure." Susan O. Schuetzow, *State Medical Peer Review: High Cost But No Benefit—Is It Time for a Change?*, 25 Am. J. L. & Med. 7, 8 (1999) (advocating for changes with respect to medical peer review in certain respects). More specifically, along with the District of Columbia, 48 states have adopted a form of medical peer review privilege. *See id.* at 58–60 (appendices detailing state statutes); *see also supra* p. 3 & Pet. App. 4a (noting this of Arizona). "[T]he existence of a consensus among the States indicates that 'reason and experience' support recognition of the privilege." *Jaffee*, 518 U.S. at 13.

Commentary on the law, also relevant in this context, *see, e.g.*, *Swidler & Berlin*, 524 U.S. at 406–07, 409 & n.4, helps to establish the reason and experience supporting the recognition of a federal medical peer review privilege. As

---

equivalents of a government-in-sunshine act or open-records law, as opposed to a means of getting at the truth in the case at hand (the ordinary reason for denying a privilege). And the Ninth Circuit was entirely untroubled that its assessment of what is "peculiarly important" public policy deviated from—and undermined—the conclusion reached by the Arizona legislature when it enacted a statutory privilege for medical peer reviews.

one leading treatise puts it, there is societal value generally in promoting self-critical analysis. *See* David P. Leonard, *The New Wigmore: Selected Rules of Limited Admissibility* § 2.6.1.b, at 167–68 (2002) ("Though some courts have declined to recognize this qualified privilege, the public interest in promoting self-critical evaluation is undeniable.") (footnote omitted). For this reason, "despite the scattering of decisions, there is a core acceptance of the utility of deploying a qualified privilege for self-analysis with its insistence that its product be withheld if alternative means of proof are available . . . ." 6 *Moore's Federal Practice* § 26.48[2], at 26-170 (3d ed. 2005). This is "much preferred to an approach that would reject the privilege across the board in service of the idea of every man's evidence." *Id.*

Accordingly, the specific form of self-critical analysis privilege at issue here—that arising in the medical peer review context—"has gained widespread acceptance." *Id.* at 26-167. The cases discussed above reflect this, *see supra* pp. 8–9 & n.2, as does also the academic commentary. The latter has particularly emphasized the deleterious effect that refusals by some federal courts to recognize a federal medical peer review privilege have on state peer review statutes and privileges. *See, e.g.*, Alissa Marie Bassler, *Federal Law Should Keep Pace with States and Recognize a Medical Peer Review Privilege*, 39 Idaho. L. Rev. 689, 705, 712 (2003); Katherine T. Stukes, *The Medical Peer Review Privilege After* Virmani, 80 N.C. L. Rev. 1860, 1861, 1866, 1870-78 (2002). Here, then, is another instance where "[d]enial of the federal privilege . . . would frustrate the purposes of the state legislation that was enacted to foster these confidential communications." *Compare Jaffee*, 518 U.S. at 13. This is especially clear here, where the Arizona Supreme Court relied heavily on *Bredice* (and the public policies it identified) in Arizona's first major opinion construing the

scope of the state's statutory peer review privilege. *See Tucson Medical Center, Inc. v. Misevech*, 113 Ariz. 34, 37–38, 545 P.2d 958, 961–62 (1976).

None of the foregoing is to suggest that the Court should announce some categorical privilege with respect to medical peer reviews. But it is equally impossible to support blanket rejections of the privilege, such as the Ninth Circuit's here. The "overwhelming public interest" in having medical peer reviews kept confidential, first identified some thirty-five years ago in *Bredice*, 50 F.R.D. at 251, and subsequently broadly recognized, supports at least a privilege or protection for retrospective incident-specific peer reviews thereafter sought in medical malpractice litigation. The matter has percolated in the lower courts for a considerable period of time, and the lack of an even broader conflict in the courts of appeals reflects not consistency, but rather the basic fact that discovery questions rarely reach the appellate process; this hardly makes them unimportant.

At bottom, there can be no doubt that the federal courts and litigants within them would benefit substantially from the Court's deciding this case. In these circumstances, deciding a case such as this would contribute to an important function of this Court; over the years, this function has played a significant role in supporting certiorari and in the formulation of resulting opinions. Consider the Court's comment at the beginning of its decision in *Upjohn Co.*:

> With respect to the privilege question the parties and various *amici* have described our task as one of choosing between two "tests" which have gained adherents in the courts of appeals. We are acutely aware, however, that we sit to decide concrete cases and not abstract propositions of law. We decline to lay down a broad rule or series of rules to govern all conceivable future questions in this area, even were we able to do so. We can and do, however, conclude that the attorney-client

> privilege protects the communications involved in this case from compelled disclosure and that the work-product doctrine does apply in tax summons enforcement proceedings.

Upjohn Co., 449 U.S. at 386. Such an approach is the common-law responsibility that Congress has placed on the Court through Federal Rule of Evidence 501.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DUANE A. OLSON *
DANIEL P. JANTSCH
MICHAEL D. WOLVER
OLSON, JANTSCH & BAKKER, P.A.
7243 North 16th Street
Phoenix, Arizona 85020
(602) 861-2705

JOSEPH D. KEARNEY
APPELLATE CONSULTING GROUP
Post Office Box 2145
Milwaukee, Wisconsin 53201
(414) 332-0966

* Counsel of Record

Attorneys for Petitioners

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-15466
D.C. No. CV-02-01686-JAT

CAROL ANN AGSTER, personal representative of the Estate of Charles J. Agster, III, deceased, and as surviving parent of Charles J. Agster, III; CHARLES J. AGSTER, JR., surviving parent of Charles J. Agster, III,

Plaintiffs-Appellees,

v.

MARICOPA COUNTY, a public entity;
MARICOPA COUNTY CORRECTIONAL HEALTH SERVICES,
a division of Maricopa County,

Defendants-Appellants,

and

MARICOPA COUNTY SHERIFF'S OFFICE, a division of Maricopa County; JOSEPH M. ARPAIO, Sheriff; BETTY J. LEWIS; JOHN DOE LEWIS, husband; BARUCH A. REUSCH; JANE DOE REUSCH, wife; LEAH R. COMPTON; JOHN DOE COMPTON, husband; KRISTINE KEMPER; JAMES E. CROUCH, husband, aka John Doe Kemper; AMANDA S. GARRISON; JOHN DOE GARRISON, husband; SUSAN E. FISHER; JOHN DOE FISHER, husband; ERIC NULPH; JANE DOE NULPH, wife; KATHERINA BROKSCHMIDT; CHARLES BROKSCHMIDT, husband, aka John Doe Brokschmidt; MICHAEL C. WILKINS; KATHLEEN WILKINS, wife, aka Jane Doe Wilkins; LAURA SODEMAN; JOHN DOE SODEMAN, husband,

Defendants.

Appeal from the United States District Court
for the District of Arizona
James A. Teilborg, District Judge, Presiding

Argued and Submitted
March 16, 2005—San Francisco, California

Filed April 28, 2005

Before: JOHN T. NOONAN, SIDNEY R. THOMAS, and RAYMOND C. FISHER, *Circuit Judges*.

Opinion by Judge Noonan.

NOONAN, *Circuit Judge*:

The parents and the representative of the estate of Charles J. Agster III (Agster) brought this action against individuals and Maricopa County and Maricopa County Sheriff's Office (collectively, the County) for the death of Agster while in the custody of the County. In this interlocutory appeal, the County challenges the order of the district court compelling production of the mortality review conducted by Correctional Health Services. We hold that we have jurisdiction to consider the County's claim of privilege, and we hold that federal law recognizes no privilege of peer review in the context of a case involving the death of a prisoner.

FACTS AND PROCEEDINGS

On August 6, 2001, Agster was arrested and taken to the county jail where he was placed in a restraint chair. His respiration decreased, and he developed an irregular heartbeat. Attempts were made to resuscitate him. He was ultimately transported to a hospital where he was placed on life support. On August 9, 2001, he was pronounced dead.

Correctional Health Services, whose employees had given medical care to Agster at the jail, was obligated to undertake a mortality review by its own policies and by Standard J-10 of the National Commission on Correctional Health Care Standards for Health Services in Jails. The review, designated as a "Critical Incident Report" was begun August 7, 2001 and finished November 8, 2001. The review was intended to be, and was, kept confidential.

On August 6, 2002, the plaintiffs brought this action in Arizona state court. On August 29, 2002, the County removed the action to the federal district court. Prior to trial, the plaintiffs sought discovery of the mortality review. The motion was opposed by the County evoking Arizona law to maintain its confidentiality. On January 30, 2002, the district court ruled "that no federal peer review has been adopted in the Ninth Circuit." The court overruled the claim of privilege and ordered the production of the document. The court declined to certify the order for interlocutory appeal.

The County appeals.

ANALYSIS

Jurisdiction. Our jurisdiction is of final judgments, 28 U.S.C. § 1291, with a gloss admitting appeal of "a narrow class of decisions that do not terminate the litigation, but must, in the interest of achieving a healthy legal system, nonetheless be treated as final." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) (internal quotations and citations omitted). Such decisions must "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). The present appeal meets these stringent conditions.

The issue of the production of the mortality review is conclusively resolved. The issue is important: the statutory grant of the claimed privilege by Arizona and other states attests to its importance. If the matter is not resolved on this appeal, the document will influence the outcome of the trial, but it will be difficult to determine the difference it made. Therefore, we find jurisdiction to decide the dispute now.

The Privilege. Arizona recognizes the privilege attached to peer review of "the professional practices within the hospital or center for the purposes of reducing morbidity and mortality and for the improvement of the care of patients provided in the institution." Ariz. Rev. Stat. §§ 36-445, 36-445.01. But we are not bound by Arizona law, and the defendants deliberately chose the federal forum to litigate this suit.

No case in this circuit has recognized the privilege. But we can create a new privilege as a matter of federal common law. A "public good transcending the normally predominant principle" disfavoring testimonial privileges may justify such creation. *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996) (internal quotations and citation omitted). The law of privilege is not frozen. The process of recognizing one is "evolutionary." *Id.* (citation omitted). It is earnestly urged that the evolution has reached the point here that the protection of confidentiality in peer review in order to assure candor in the review has been recognized by most states. *Weekoty v. United States*, 30 F. Supp. 2d 1343, 1348 (D. N.M. 1998); Note, *The Medical Review Committee Privilege: A Jurisdictional Survey*, 67 N.C.L. Rev. 179 (1988).

We are constrained by two considerations, one general and the other particular to this case. We must be "especially reluctant to recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself." *Univ. of Pennsylvania v. EEOC*, 493 U.S. 182, 189 (1990). The Health Care Quality Improvement Act of 1986 granted immunity to

participants in medical peer reviews, but did not privilege the report resulting from the process. *See* 42 U.S.C. §§ 11101-11152. Congress amended the act in 1987 to state that "nothing in this subchapter shall be construed as changing the liabilities or immunities under law or preempting or overriding any State law." Pub. L. No. 100-177, § 402(c). As Congress has twice had occasion and opportunity to consider the privilege and not granted it either explicitly or by implication, there exists a general objection to our doing so.

The particular objection is that the privilege is sought to protect a report bearing on the death of a prisoner. Whereas in the ordinary hospital it may be that the first object of all involved in patient case [*sic*] is the welfare of the patient, in the prison context the safety and efficiency of the prison may operate as goals affecting the care offered. In these circumstances, it is peculiarly important that the public have access to the assessment by peers of the care provided. Given the demands for public accountability, which seem likely to guarantee that such reviews take place whether they are privileged or not, we are not convinced by the County's argument that such reviews will cease unless kept confidential by a federal peer review privilege. Accordingly, we are unwilling to create the privilege in this case.

The State Law Claims. Where there are federal question claims and pendent state law claims present, the federal law of privilege applies. Fed. R. Evid. 501 advisory committee note; *see also Wm. T. Thompson Co. v. Gen. Nutrition Corp.*, 671 F.2d 100, 104 (3rd Cir. 1982).

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

NO: CV 02-1686-PHX-JAT

CAROL ANN AGSTER, personal representative of the Estate of CHARLES J. AGSTER, III, deceased; CHARLES J. AGSTER, JR., and CAROL ANN AGSTER, surviving parents of CHARLES J. AGSTER, III,

Plaintiffs,

v.

MARICOPA COUNTY, a Public Entity; MARICOPA COUNTY SHERIFF'S OFFICE, a division of Maricopa County; MARICOPA COUNTY DEPARTMENT OF CORRECTIONAL HEALTH SERVICES, a division of Maricopa County; JOSEPH M. ARPAIO, MARICOPA COUNTY SHERIFF; BETTY J. LEWIS, and JOHN DOE LEWIS, her husband; BARUCH A. REUSCH and JANE DOE REUSCH, his wife; LEAH R. COMPTON, and JOHN DOE COMPTON, her husband; JOHN DOES I-X and JANE DOES I-X,

Defendants.

ORDER

[Stamped "Filed Jan 30, 2004
Clerk US District Court
District of Arizona"]

Pending before this Court is Plaintiffs' Motion to Compel Discovery from Defendant Maricopa County Correctional Health Services (Doc. #199). Basically, Plaintiffs have propounded a request for production (though neither party attached a copy of the request to the pleadings relating to the motion to compel). Defendant Maricopa County Correctional

Health Services has objected to production based on privilege (though neither party attached a copy of the objection to the pleadings relating to the motion to compel), specifically a "peer review privilege." (Response, pg. 4).

The Court finds that no federal peer review privilege has been adopted in the Ninth Circuit. Accordingly, because there are federal claims in this case, the Court will overrule the objection based on federal peer review privilege.

Therefore,

IT IS ORDERED that the Motion to compel (Doc. #199) is granted to the extend [*sic*] that any objection to Plaintiffs' request for production based on federal peer review privilege is overruled.

Dated this 29 day of Jan, 2004.

/s/ James A. Teilborg
JAMES A. TEILBORG
United States District Judge

(5)

Supreme Court, U.S.
FILED
AUG 29 2005
OFFICE OF THE CLERK

No. 05-139

IN THE

Supreme Court of the United States

MARICOPA COUNTY, a public entity, and
MARICOPA COUNTY CORRECTIONAL HEALTH SERVICES,
a division of Maricopa County,
Petitioners,

v.

CAROL ANN AGSTER, personal representative of the
Estate of Charles J. Agster, III, *et al.*
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

MICHAEL C. MANNING *
SEAN B. BERBERIAN
LESLIE E. O'HARA
STINSON MORRISON HECKER LLP
1850 North Central Avenue
Suite 2100
Phoenix, AZ 85004
(602) 279-1600

* Counsel of Record

Attorneys for Respondents

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the Court should create a new federal peer review privilege in a federal civil rights case when the United States Congress has twice considered the relevant competing concerns but has not created the privilege?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
STATEMENT OF THE CASE	3
REASONS FOR DENYING THE PETITION	5
I. FEDERAL LAW DETERMINES THE QUESTION OF PRIVILEGE	5
II. THERE IS NO RECOGNIZED FEDERAL PEER REVIEW PRIVILEGE FOR THE MATERIALS SOUGHT	6
III. THERE IS NO SPLIT OF AUTHORITY AMONG THE CIRCUITS ON THE QUESTION OF THE PEER REVIEW PRIVILEGE	11
IV. CONGRESS HAS ADDRESSED THE PEER REVIEW PRIVILEGE ON SEVERAL OTHER OCCASIONS, AND NONE OF THOSE ENACTMENTS APPLY HERE	13
V. THE DISTRICT COURT CASES CITED BY PETITIONERS ARE AGAINST THE WEIGHT OF AUTHORITY	14
VI. THE ACTIONS OF THE STATES NEED NOT BE CONSIDERED WHERE CONGRESS HAS ACTED	16
VII. THE POLICY REASONS JUSTIFYING STATE PEER REVIEW STATUTES ARE ABSENT IN THIS CIVIL RIGHTS CASE	16
CONCLUSION	18

TABLE OF AUTHORITIES

CASES — Page

Agster v. Maricopa County, 406 F.3d 1091 (9th Cir. 2005) 2, 11
Balk v. Dunlap, 163 F.R.D. 360 (D. Kan. 1995) ... 15
Bredice v. Doctors Hospital, Inc., 50 F.R.D. 249 (D. D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973) 2, 11, 15
Breed v. United States District Court, 542 F.2d 1114 (9th Cir. 1976) 5
Brem v. DeCarlo, Lyon, Hearn & Pazourek, PA, 162 F.R.D. 94 (D. Mass. 1995) 15
Chalal v. Northwest Medical Center, Inc., 147 F. Supp. 2d 1160 (N.D. Ala. 2000), *aff'd*, 250 F.3d 749 (11th Cir. 2001), *cert. denied*, 534 U.S. 891 (2001) 7
Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) 4
Gillman v. United States, 53 F.R.D. 316 (S.D. N.Y. 1971) 15
Hancock v. Hobbs, 967 F.2d 462 (11th Cir. 1992) 6
Humana Hospital v. Superior Court, 154 Ariz. 396, 742 P.2d 1382 (App. 1987) 16
Jaffee v. Redman, 518 U.S. 1 (1996) 6
Johnson v. Nyack Hospital, 169 F.R.D. 550 (S.D. N.Y. 1996) 5, 9
Memorial Hospital v. Shadur, 664 F.2d 1058 (7th Cir. 1981) 2, 9, 11
Poliner v. Texas Health Sys., 201 F.R.D. 437 (N.D. Tex. 2001) 12
Robertson v. Neuromedical Center, 169 F.R.D. 80 (M.D. La. 1996) 7, 9
Swarthmore Radiation Oncology, Inc. v. Lapes, 1993 WL 517722 (E.D. Pa. 1993) 9

TABLE OF AUTHORITIES—Continued

Page

Swidler & Berlin v. United States, 524 U.S. 399 (1998) 6
Syposs v. United States, 179 F.R.D. 406 (W.D. N.Y. 1998), *adhered to on reconsid.*, 63 F. Supp. 2d 301 (1999) 16
Syposs v. United States, 63 F. Supp. 2d 301 (W.D. N.Y. 1999) 10, 11, 14-15
Teasdale v. Marin General Hospital, 138 F.R.D. 691 (N.D. Cal. 1991) 9
Trammell v. United States, 445 U.S. 40 (1980) 6, 7
Tucker v. United States, 143 F. Supp. 2d 619 (S.D. W.Va. 2001) 10, 14
United States v. Harris Methodist Fort Worth, 970 F.2d 94 (5th Cir. 1992) 2, 11,12
United States v. Nixon, 418 U.S. 683 (1974) 6
University of Pennsylvania v. EEOC, 493 U.S. 182 (1990) 6, 7, 13
Virmani v. Novant Health Inc., 259 F.3d 284 (4th Cir. 2001) 2, 11, 12, 17
Weekoty v. United States, 30 F. Supp. 2d 1343 (D. N.M. 1998) 14

STATUTES

10 U.S.C. § 1102(a) 13
14 U.S.C. § 645(b) 13
38 U.S.C. § 5705(a) 13
42 U.S.C. § 1320(c-9) 13
42 U.S.C. § 1983 3
Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101-11152 2
42 U.S.C. § 11101 ..... 8, 12
42 U.S.C. § 11111(a)(1) 2, 8
42 U.S.C. § 11115(a) 3

TABLE OF AUTHORITIES—Continued

	Page
42 U.S.C. § 11137(b)(1)	2, 8
A.R.S. § 12-611	3
RULES	
Fed. R. Evid. 501	2, 5, 15
Fed. R. Civ. Proc. 26(b)(1)	5
TREATISES	
3 J. Weinstein, M. Burger and J. McLaughlin, *Weinstein's Evidence* (2d ed. 2005)	6

IN THE

Supreme Court of the United States

No. 05-139

MARICOPA COUNTY, a public entity, and
MARICOPA COUNTY CORRECTIONAL HEALTH SERVICES,
a division of Maricopa County,
Petitioners,

v.

CAROL ANN AGSTER, personal representative of the
Estate of Charles J. Agster, III, *et al.*
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Carol Ann Agster, personal representative of the Estate of Charles J. Agster, III, deceased, and as surviving parent of Charles J. Agster, III, and Charles J. Agster, Jr., surviving parent of Charles J. Agster, III (the "Agsters"), respectfully request that this Court deny Maricopa County and its Department of Correctional Health Services' Petition for a Writ of Certiorari seeking review of the unanimous decision of the Ninth Circuit Court of Appeals.

INTRODUCTION

This case involves a routine discovery dispute that is, and was, readily resolved by reference to existing law. No circuit court has recognized a federal peer review privilege, and

Congress has repeatedly declined to enact such a law. Instead of lobbying Congress to pass this law, Maricopa County is asking the federal courts to create it. This strategy is a blatant attempt to thwart the power of Congress.

Not surprisingly, the three circuit courts of appeal that have directly addressed the question of whether a federal peer review privilege exists are unanimous: ***there is no such privilege.***[1] Petitioners try to conjure up a split of authority where none exists, by pointing to a single case that addresses the topic only briefly, in *dicta*. *See United States v. Harris Methodist Fort Worth*, 970 F.2d 94, 103 (5th Cir. 1992). And the brief mention of this issue in *Harris Methodist* inappropriately relies upon *Bredice v. Doctors Hospital, Inc.*, 50 F.R.D. 249 (D. D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973)—a district court decision that predates the enactment of both Federal Rule of Evidence 501 and the statutory scheme that governs the discoverability of the material sought, the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101-11152 ("HCQIA"). Petitioners' only other alleged source of support is the outdated district court decision, *Bredice*. In short, the law is not unsettled, nor is there a split among the circuits that would justify this Court's intervention.

Moreover, Congress has acted in the area of medical peer review—six times—and has declined to enact a peer review privilege of the type advocated by Petitioners. Most notably, the HCQIA of 1986 grants immunity to the participants in medical peer reviews, but not the report resulting from the process. 42 U.S.C. § 11111(a)(1); 42 U.S.C. § 11137(b)(1); Pet. App. 4a-5a. One year after its enactment, the HCQIA was amended, and Congress proclaimed that "nothing in this subchapter shall be construed as changing the liabilities or

---

[1] *Agster v. Maricopa County*, 406 F.3d 1091 (9th Cir. 2005); *Virmani v. Novant Health Inc.*, 259 F.3d 284 (4th Cir. 2001); *Memorial Hospital v. Shadur*, 664 F.2d 1058 (7th Cir. 1981).

immunities under law or preempting or over-riding any State law." 42 U.S.C. § 11115(a); Pet. App. 5a. Accordingly, any ***creation*** of a federal peer review privilege should be left to the deliberation of Congress. And petitioner and its many lobbyist organizations should utilize the appropriate channels for creating federal legislation, by lobbying Congress.

STATEMENT OF THE CASE

This case involves a claim for wrongful death brought pursuant to 42 U.S.C. § 1983 and Arizona's wrongful death statute, A.R.S. § 12-611. Originally filed in state court, the Petitioners removed the case to federal court. The discovery at issue in this case is directly relevant to, and crucial for, the Agsters' federal civil rights claim.

Charles Agster, a mentally challenged 33 year-old man, who operated at the level of a 12 year-old, died at the hands of detention officers and correctional health personnel employed by the Maricopa County Sheriff's Office ("MCSO") and Maricopa County Correctional Health Services ("CHS"). Arrested for loitering at a convenience store, Charles laid helplessly in the intake area of the county jail until he was violently forced into a restraint chair contraption by nine MCSO jailers. Record 44, ¶¶ 36, 38, 41-43. The jailers' methods of forcing Charles into the chair compromised his ability to breathe and caused him to lose consciousness. *Id.* at ¶¶ 44-47.

In front of the jail nurse, Charles experienced a cardiac event and was found not to be breathing. The paramedics ***were not*** called. Resuscitative efforts ***were not*** started. Instead, Nurse Betty Lewis of CHS, performed an endless number of pain stimuli tests to determine if Charles was "faking it." Only after she spent five precious minutes assuring herself that Charles was in a medical emergency and not breathing were the paramedics finally notified. *Id.* at ¶ 61. By then it was too late. Though Charles' heartbeat was

eventually restored by paramedics, he had suffered such serious brain damage that he was left in a vegetative state from which he never recovered. He died two days later.

An investigation was conducted by the MCSO and CHS. The Agsters know very little of the nature or extent of it, but they do know that at least two meetings were held, the second of which was on November 20, 2001, resulting in the abrupt termination of the alleged resignation of Nurse Lewis. Nurse Lewis is, not surprisingly, vague and conveniently forgetful as to what transpired during that meeting.

The Agsters moved to compel production of the documents generated by or reviewed during these meetings and the investigation, particularly the mortality review conducted by CHS. The Agsters further moved to compel production of testimony of the participants of the November 20 meeting. Their motion was granted, the district court finding that there was no federal peer review privilege that would preclude production. Pet. App. 6a-7a.

Petitioners appealed to the Ninth Circuit. The Ninth Circuit found jurisdiction of the interlocutory appeal under the *Cohen* collateral-order doctrine.[2] The Ninth Circuit unanimously upheld the district court, and while it acknowledged its power to create a new privilege as a matter of federal common law, it chose not to, finding itself constrained by two considerations: 1) Congress' refusal to create such a privilege where it has twice "considered the relevant competing concerns but has not provided the privilege itself;" and 2) the public's right to access the assessment by peers of the care provided in prison. The demands for public accountability, the Court reasoned, likely guaranteed that the reviews would take place whether privileged or not. Pet. App. 4a-5a.

---

[2] *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

The evidence withheld by Petitioners is crucial to the Agsters' civil rights claim. And this case is set to begin trial on January 31, 2006. The County's Petition to this Court may prevent the Agsters from collecting this key evidence for use at trial. Accordingly, the Agsters ask the Court to deny the Petition as soon as possible, so that the case may be tried on the merits.

REASONS FOR DENYING THE PETITION

I. FEDERAL LAW DETERMINES THE QUESTION OF PRIVILEGE.

Discovery in civil actions brought in federal courts is governed by the Federal Rules of Civil Procedure. The standard for discovery under those rules is extremely broad. Rule 26(b)(1) provides: "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ."

Rule 501 of the Federal Rules of Evidence provides the framework for determining whether material sought in discovery is privileged. The Rule states that other than those privileges established by the Constitution, an act of Congress or Supreme Court rule, determinations of privilege are "governed by the principals of the common law as they may be interpreted by the courts of the United States in light of reason and experience . . . ." The goal, of course, is the development of a single, uniform federal law of evidentiary privileges. *Johnson v. Nyack Hospital*, 169 F.R.D. 550, 558 (S.D. N.Y. 1996).

In a federal question case, such as this, the federal common law of privilege applies—not state statutory privilege. *Breed v. United States District Court*, 542 F.2d 1114, 1115 (9th Cir. 1976). When § 1983 claims (or other federal claims) are asserted along with state law claims, federal privilege law controls the privilege issue for all claims, state and federal.

Hancock v. Hobbs, 967 F.2d 462, 467 (11th Cir. 1992) (holding that "it would be impractical to apply two different rules of privilege to the same evidence between a single jury."). Because evidentiary privileges operate to exclude relevant evidence and thus block the judicial fact-finding function, they are not favored and where recognized, must be narrowly construed. *United States v. Nixon*, 418 U.S. 683, 710 (1974).

II. THERE IS NO RECOGNIZED FEDERAL PEER REVIEW PRIVILEGE FOR THE MATERIALS SOUGHT.

Federal courts will recognize new privileges on a case-by-case basis. *Jaffee v. Redman*, 518 U.S. 1, 8 (1996). In doing so, the courts balance the public's need for the full development of relevant facts in federal litigation against the countervailing demand for confidentiality in order to achieve the objective underlying the privilege at issue. The court must be convinced that there is "public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." 3 J. Weinstein, M. Burger, J. McLaughlin, *Weinstein's Evidence* ¶ 501.03[3] (2d ed. 2005). This balance does not often favor recognition of a new privilege unless it "promotes a sufficiently important interest to outweigh the need for probative evidence." *University of Pennsylvania v. EEOC*, 493 U.S. 182, 189 (1990). Courts are tentative about adopting proposed privileges without a historical basis.[3] 3 *Weinstein's Evidence* ¶ 501.03[6]. The peer review privilege lacks a "historical, constitutional or statutory basis" similar to that of other long-recognized priv-

---

[3] *Trammel v. United States*, 445 U.S. 40, 43-44 (1980) ("The privilege claimed by petitioner [adverse spousal testimony] has ancient roots."); *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (attorney-client privilege "is one of the oldest recognized privileges for confidential communications").

ileges. *Univ. of Pennsylvania*, 493 U.S. at 183; *Robertson v. Neuromedical Center*, 169 F.R.D. 80, 83 (M.D. La. 1996) ("There is no historical or statutory basis for a peer review materials privilege"). The starting point in the analysis for recognition of a privilege is always the "fundamental principle that 'the public . . . has a right to every man's evidence.'" *Univ. of Pennsylvania*, 493 U.S. at 183 (*quoting Trammell*, 445 U.S. at 50).

The power to recognize new privileges is not unfettered. This Court has cautioned that courts must be "***especially reluctant to recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself.***" *Univ. of Pennsylvania*, 493 U.S. at 189 (emphasis added). And Congress has considered the peer review issue at least six times, and has declined to create a federal peer review privilege that would protect the discovery requested here.

In *University of Pennsylvania*, an action brought under Title 7 of the Civil Rights Act of 1964, this Court determined that neither federal common law, nor the First Amendment, warranted the recognition of a privilege for the peer review materials sought—a university's tenure review files. In rejecting the claim of privilege, the Court emphasized Congress' failure to create a privilege for peer review documents, in extending Title 7 to educational institutions. *Univ. of Pennsylvania*, 493 U.S. at 189.

Similarly, in 1986, Congress passed the Health Care Quality Improvement Act, whose purpose was to "encourage peer review proceedings by which hospitals evaluate and discipline staff physicians . . ." by limiting the financial liability of those participating in the proceedings. *Chalal v. Northwest Medical Center, Inc.*, 147 F. Supp. 2d 1160, 1170 (N.D. Ala. 2000), *aff'd*, 250 F.3d 749 (11th Cir. 2001), *cert. denied*, 534 U.S. 891 (2001).

42 U.S.C. § 11101 lists Congress' findings in support of the legislation:

> (1) The increasing occurrence of medical malpractice and the need to improve the quality of medical care have become nationwide problems that warrant greater efforts than those that can be undertaken by any individual state.
>
> (2) There is a national need to restrict the ability of incompetent physicians to move from state to state without disclosure or discovery of the physician's previous damaging or incompetent performance.
>
> (3) This nationwide problem can be remedied through effective professional peer review.
>
> (4) The threat of private money damage liability under Federal laws, including treble damage liability under Federal antitrust law, unreasonably discourages physicians from participating in effective professional peer review.
>
> (5) There is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review.

Recognizing the potential pitfalls to individual physicians from participating in peer reviews, the statute provides them immunity from liability for money damages. 42 U.S.C. § 11111(a)(1). It also accords peer review protection and privileged status to three categories of documents, but only if the information is provided to National Reporting Agencies: (1) medical payments made by the facilities; (2) sanctions of physicians by the Board of Medical Examiners; and (3) Professional Review actions that adversely affect the privileges of a practitioner. 42 U.S.C. § 11137(b)(1). Yet Congress, while recognizing the need for effective peer review and the potential dangers associated with it, still ***did not*** establish a privilege for most documents involved in the peer review

process, including those at issue here, nor did it accord any type of discovery immunity to peer review participants.

Congress' silence in this regard persuaded both the Ninth Circuit in *Agster* and the Fourth Circuit in *Virmani* that any change in the peer review privilege was to be made by Congress.[4] This same inaction on the part of Congress has been equally compelling to the district courts.[5] Indeed, concluding otherwise would permit the federal courts to misappropriate the power of Congress.

Petitioners contend that the variations in the cases (though, in truth, there is little variation) can be explained on the basis of the context of the case—those involving discrimination, civil rights, and antitrust claims may be more likely ***not*** to find a peer review privilege than a medical malpractice case. This alleged distinction is of little merit here, as the Agsters' civil rights claim is one for wrongful death occasioned by

---

[4] The Seventh Circuit case refusing to find a federal peer review privilege predated enactment of the HCQIA, and instead was based on the Court's conclusion that: "The public interest in private enforcement of federal antitrust law in this context is simply too strong to permit the exclusion of relevant and possible crucial evidence by application of the Hospital's privilege." *Shadur*, 664 F.2d at 1063.

[5] *Johnson*, 169 F.R.D. at 560 ("Congress spoke loudly with its silence in not including a privilege against discovery of peer review material in the HCQIA"); *Robertson*, 169 F.R.D. at 84 (referencing Congress' silence on the subject of a federal peer review privilege in the HCQIA, the Court concluded that Congress did not intend peer review committee records to have the level of confidentiality and protection they may have pursuant to a state statute); *Teasdale v. Marin General Hospital*, 138 F.R.D. 691, 694 (N.D. Cal. 1991) (holding hospital peer review documents discoverable and not privileged in an antitrust action: "Congress spoke loudly with its silence in not including a privilege against discovery of peer review materials in the HCQIA."); *Swarthmore Radiation Oncology, Inc. v. Lapes*, 1993 WL 517722 (E.D. Pa. 1993) (the court looked to the HCQIA for guidance as to whether a doctor's application for staff privileges was protected under the state peer review statute, concluding that because of Congress' silence, it was not).

Petitioners' deliberate indifference and excessive force—not mere medical negligence. But even if it were a medical malpractice case, no federal peer review privilege would bar the discovery sought:

> To suggest that the search for truth by the courts has stronger justification and may override an asserted peer review privilege in a discrimination case but not a malpractice case minimizes the strong public interest in the prevention and compensation of serious personal injuries or death caused by government employees, an interest at least equal to the interest in eradicating and compensating for violations of a person's civil rights. The value of protection against job discrimination is substantially reduced if the ability to enjoy its benefit is physically impaired or ended. ***Privileges usually do not vary depending upon the nature of the action as their very purpose is to bar compelled disclosure irrespective of the nature of the proceeding in connection with which they may arise.*** The hospitals' attempt to distinguish *University of Pennsylvania* on the basis of the underlying causes of actions in that case and the other cases relied upon by the court from the one at bar is without merit.

Syposs v. United States, 63 F. Supp. 2d 301, 304 (W.D. N.Y. 1999) (emphasis added).

Both *Syposs* and *Tucker v. United States*, 143 F. Supp. 2d 619 (S.D. W.Va. 2001) were actions brought under the Federal Tort Claims Act. Both courts were asked to apply a federal peer review privilege to preclude disclosure of certain information. And both courts declined to do so for the same reason: "where Congress had the opportunity to create a privilege pursuant to statute [HCQIA], yet failed to do so, courts should be especially hesitant in recognizing a federal privilege." *Tucker,* 143 F. Supp. 2d at 626-627. The duty to recognize the federal peer review privilege "requires a weigh-

ing of interests more appropriate for Congress than for the courts." *Id.*; *Syposs*, 63 F. Supp. 2d at 304 (holding same).

III. THERE IS NO SPLIT OF AUTHORITY AMONG THE CIRCUITS ON THE QUESTION OF THE PEER REVIEW PRIVILEGE.

There are no conflicting circuit court decisions on the issue, and thus no reason for this Court to intervene. The Seventh Circuit rejected the peer review privilege in *Shadur*, but did so on the basis of the importance of the requested material to the antitrust claim involved.[6] The Fourth Circuit, in *Virmani*, declined to find peer review records privileged from discovery in a discrimination action, in part because Congress had failed to create such a privilege in the HCQIA. *Virmani*, 259 F.3d at 291. The Ninth Circuit found the same reason compelling. *Agster*, 406 F.3d at 1094.

Contrary to Petitioners' contention, the Fifth Circuit did not reach the opposite conclusion. Nothing in the *Harris Methodist* case reflects the Court's endorsement of a medical peer review privilege. At issue there was the reasonableness of an administrative search under the Fourth Amendment. At one point, the court mentioned that "the medical peer review process 'is the *sine qua non* of adequate hospital care,'" citing *Bredice*, a case decided before the enactment of Rule 501 or the HCQIA. *Harris Methodist*, 970 F.2d at 103. This mention of peer review is *dicta*, as demonstrated by the sentence immediately following it: "[B]ecause we affirm the district court's determination that the proposed search exceeded bounds of reasonableness, ***we need not define the scope of any applicable privilege***." *Id.* (emphasis added). Notably, the Fourth Circuit, in *Virmani*, expressly rejected the *Harris Methodist* case as supporting recognition of the peer review privilege. "This case [*Harris*] is, therefore, inap-

---

[6] *Shadur* predated enactment of the HCQIA.

posite, since it involves the balancing interests under the Fourth Amendment, not Federal Rule of Evidence 501." *Virmani*, 259 F.3d at 293.

While acknowledging that the Fifth Circuit did not directly address the peer review issue, Petitioners amazingly claim that "there can be no doubt that *Harris Methodist* and the protection from discovery it contemplates for medical peer reviews are the law within the Fifth Circuit," *citing Poliner v. Texas Health Sys.*, 201 F.R.D. 437 (N.D. Tex. 2001). Maricopa County Petition, at 7. Quite the opposite is true. In *Poliner*, the Magistrate recognized that the HCQIA creates ***no*** bar to discovery of the peer review material sought. While the Magistrate noted the absence of a federally recognized peer review privilege, he then, without authority, concluded that "it is clear that Congress recognized that peer review materials are sensitive and inherently confidential, and that confidentiality serves an important public interest. *See* 42 U.S.C. § 11101." *Poliner*, 201 F.D.R. at 438. He made no mention of the protections that Congress did choose to include or exclude from the Act. Despite this—unsupported—reference to Congressional intent, the Magistrate then proceeded to order the discovery produced with very few restrictions (patient names were redacted and a protective order issued). The Magistrate's ruling in *Poliner* provides Petitioners no support for their position and hardly serves to illustrate a rift among the circuit courts.

Petitioners also argue that in the HCQIA's treatment of peer reviews themselves Congress did nothing different from what it did in enacting Federal Rule of Evidence 501: they claim it neither prescribed nor proscribed a particular privilege. This is simply nonsensical, conflicting with the basic rules of statutory construction. The Act expressly prescribes when the peer review privilege applies, to what and to whom.

IV. CONGRESS HAS ADDRESSED THE PEER REVIEW PRIVILEGE ON SEVERAL OTHER OCCASIONS, AND NONE OF THOSE ENACTMENTS APPLY HERE.

Congress could have gone further and enacted a broader or even a blanket privilege. It has done so in other instances. For example, medical quality assurance records created by or for the Department of Defense as part of a medical quality assurance program are confidential and privileged. 10 U.S.C. § 1102(a). The same is true for medical quality assurance records created by or for the Department of Veteran's Affairs, and those created by or for the Coast Guard. 38 U.S.C. § 5705(a); 14 U.S.C. § 645(b). Finally, the Peer Review Improvement Act, which is part of the Social Security Act of 1982, provides that materials generated by a peer review organization ("PRO") in pursuit of its statutory function (auditing federally funded healthcare) are not subject to discovery and that no document collected is subject to production. 42 U.S.C. § 1320(c-9).

These statutes demonstrate that Congress ***will*** create a broad peer review privilege ***when it is so inclined.*** Its failure to create this kind of blanket privilege or to create a more expansive privilege than it did in the HCQIA is evidence of Congressional intent ***not*** to create such a privilege. To judicially create such a privilege here would run counter to this Court's proclamation in *University of Pennsylvania*, that courts must be "especially reluctant to recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself." 493 U.S. at 189.

V. THE DISTRICT COURT CASES CITED BY PETITIONERS ARE AGAINST THE WEIGHT OF AUTHORITY.

Petitioners argue that confusion among the lower courts justifies this Court's intervention. But the cases they cite are considered anomalies and against the weight of federal authority.

In *Weekoty v. United States*, 30 F. Supp. 2d 1343 (D. N.M. 1998), the district court stated that congressional action in other areas dealing with a peer review privilege combined with state legislative recognition of the privilege, overcame any impediment caused by Congress' failure to act in this specific regard. *Weekoty*, 30 F. Supp. 2d at 1347. This conclusion has been soundly criticized by other courts. For example, the court in *Tucker* stated: "In *Weekoty*, the court recognized a self-critical analysis privilege in an FTCA case. Although the court in *Weekoty* noted that the HCQIA establishes confidentially for certain records relating to the peer review process, *Weekoty*, 30 F. Supp. 2d at 1347, the court made no attempt to address Congress' failure to enact a blanket federal peer review privilege." *Tucker*, 143 F. Supp. 2d at 627. The same conclusion was reached in *Syposs*:

> For the reasons discussed, this court respectfully disagrees with the court's reasoning in *Weekoty*. First, *Weekoty* asserts, relying on a law review article (citation omitted) that the peer review privilege has a "unique role in preserving the public health." *Weekoty, supra*, at 1345. However, a complete reading of the article reveals it is primarily a commentary on the state peer review statutes and relevant case law and contains no objective studies or other opinion to support the court's broad assertion. Second, the court held that considerations of comity required deference to the New Mexico peer review privilege statute. *Weekoty* at 1346. As discussed, *supra*, deference to

> state privilege statutes is not required for federal courts. Third, although the court notes that the HCQIA established confidentiality for certain records relating to the peer review process, the court makes no attempt to address Congress' failure to enact a federal privilege for all such records the absence of any such privilege. ***Thus, the court's analysis is in opposition to the Supreme Court's admonition in University of Pennsylvania that courts should hesitate in finding a privilege when Congress has declined to do so.***

Syposs, 63 F. Supp. 2d at 308 (emphasis added).

Furthermore, *Brem v. DeCarlo, Lyon, Hearn & Pazourek, PA*, 162 F.R.D. 94 (D. Mass. 1995), is of no support, as the only claim in *Brem* to which the deposition request at issue related was a state defamation claim, not the federal discrimination claims. Rule 501 requires application of state privilege law to the state claim. The court did not reach the question of whether the federal common law recognized a parallel privilege.

In *Balk v. Dunlap*, 163 F.R.D. 360 (D. Kan. 1995), the Court failed to address what claims were being made, and whether a federal question was involved or not. It cannot serve as a basis for Petitioners' position. And, finally, both *Bredice, supra*, and *Gillman v. United States*, 53 F.R.D. 316 (S.D. N.Y. 1971) were decided before Rule 501 and the HCQIA were enacted and can serve as no compelling authority for Petitioners' position.

These cases fail to overcome the cogent analysis and compelling authority of the cases where the adoption of a federal peer review privilege in a federal question case is squarely addressed. And those cases are in agreement: there is no federal peer review privilege.

VI. THE ACTIONS OF THE STATES NEED NOT BE CONSIDERED WHERE CONGRESS HAS ACTED.

Petitioners argue that the existence of state peer review privileges in most jurisdictions should compel the conclusion that "reason and experience" mandate the adoption of a federal counterpart. But because Congress has acted in the area, or, as here, chosen not to act, this Court need not reach the "reason and experience" analysis, and the policy decisions of the states are irrelevant. Most courts agree: "Whether the public interest would be served by a medical peer review privilege in federal cases requires a weighing of interests more appropriate for Congress than for the Court. Thus, the fact that such peer review privileges exist under numerous state statutes is immaterial." *Syposs v. United States*, 179 F.R.D. 406, 412 (W.D. N.Y. 1998), *adhered to on reconsid.*, 63 F. Supp. 2d 301 (1999).

VII. THE POLICY REASONS JUSTIFYING STATE PEER REVIEW STATUTES ARE ABSENT IN THIS CIVIL RIGHTS CASE.

One of the frequently cited policy reasons given for peer review protection in state cases is to encourage candor among the physician participants. Arizona is included.

> However, doctors seem to be reluctant to engage in strict peer review due to a number of apprehensions: loss of referrals, respect, and friends, possible retaliations, vulnerability to torts, and fear of malpractice actions in which the records of the peer review proceedings might be used.

Humana Hospital v. Superior Court, 154 Ariz. 396, 400, 742 P.2d 1382, 1386 (App. 1987).

Most of these policy reasons are absent here, diluting the argument for the need for protection. The same social and

economic dynamics at play among private physicians at a private hospital, dynamics considered in the peer review decisions, are largely inapplicable to employees of the County's Correctional Health Service. The detainee-patients are not ***voluntary*** patients.

Nor has the County shown that its employees would forego participation in peer review because of the threat of disclosure. Not all participants would. "A doctor called upon to serve on a medical peer review committee may have a sense of obligation to the public at large, in addition to a personal desire to maintain quality health care, which may overcome any reluctance to serve and be forthcoming on a peer review committee, even in the absence of a privilege." *Virmani*, 259 F.3d at 290, n. 7. Indeed, for decades, government health care providers have participated in peer review activities without a federal peer review privilege. What has suddenly changed, requiring the Court to create a new privilege?

Finally, as the Ninth Circuit noted, the public's interest in accountability regarding the manner in which the prisons are run trumps any privacy interest the jailors might have. Federal claims, such as § 1983 civil rights claims for deliberate indifference and excessive force, carry a tremendous national interest. Indeed, there is good reason for Congress' repeated refusal to enact a broad privilege that would prevent the disclosure of vital evidence for such federal claims. The federal courts should not be the mechanism to create this privilege, after Congress has refused to do so. Petitioners and the American Medical Association should be forced to continue lobbying Congress to create a new privilege.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

MICHAEL C. MANNING *
SEAN B. BERBERIAN
LESLIE E. O'HARA
STINSON MORRISON HECKER LLP
1850 North Central Avenue
Suite 2100
Phoenix, AZ 85004
(602) 279-1600

* Counsel of Record

Attorneys for Respondents

(3)

No. 05-139

MOTION FILED

AUG 29 2005

In The
Supreme Court of the United States

MARICOPA COUNTY, a public entity, and MARICOPA COUNTY CORRECTIONAL HEALTH SERVICES, a division of Maricopa County,

Petitioners,

v.

CAROL ANN AGSTER, personal representative of the Estate of Charles J. Agster, III, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF THE COUNTY OF LOS ANGELES, LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

RAYMOND G. FORTNER, JR.
County Counsel
PHILIP S. MILLER
Assistant County Counsel
DORAINE F. MEYER*
Senior Deputy County Counsel
OFFICE OF THE COUNTY COUNSEL
500 West Temple Street
Los Angeles, CA 90012
(213) 974-8118

JENNIFER HENNING
CALIFORNIA STATE ASSOCIATION OF COUNTIES
1100 K Street, Suite 101
Sacramento, CA 95814
(916) 327-7535

Attorneys for Amici Curiae

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

MOTION OF CALIFORNIA STATE ASSOCIATION OF COUNTIES FOR LEAVE TO JOIN IN FILING BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

The California State Association of Counties ("CSAC")[1] hereby respectfully moves for leave to join Los Angeles County and the Los Angeles Sheriff's Department in filing the attached brief *amici curiae* in this case. The consent of the attorneys for the petitioners has been obtained. The consent of the attorneys for the respondents was requested but refused.

CSAC is a non-profit corporation whose membership consists of 58 California counties. CSAC sponsors a Litigation Coordination Program, administered by the County Counsel's Association of California and overseen by the Association's Litigation Overview Committee. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties. Because of its membership, CSAC is in a position to provide a unique perspective to this Court to aid in the decision of the important issue raised by Petitioners.

Almost four decades ago, the California State Legislature provided confidentiality to members of medical peer review committees. The state privilege has fostered an environment where health care professions can self-critique candidly behind closed doors to promote quality patient care without fear of being drawn into a civil lawsuit.

---

[1] The County of Los Angeles and Los Angeles County Sheriff's Department are exempt from the consent requirement under Rule 37.4.

CSAC believes that the Ninth Circuit's decision undercuts the public policy of the state of California and renders its medical peer review privilege practically meaningless. Physicians in California must now worry that their once-privileged communications in a peer review setting may be discoverable in a federal court proceeding. This uncertainty will undoubtedly have a chilling effect on a process that has now been recognized by all 50 states as a highly effective means of promoting quality health care. Because of the devastating impact of the Ninth Circuit's decision on health care facilities in all California counties, CSAC respectfully requests leave to join the County of Los Angeles and the Los Angeles County Sheriff's Department in the attached brief *amici curiae* in support of petitioners.

Respectfully submitted,

RAYMOND G. FORTNER, JR.
County Counsel
PHILIP S. MILLER
Assistant County Counsel
DORAINE F. MEYER*
Senior Deputy County Counsel
OFFICE OF THE COUNTY COUNSEL
500 West Temple Street
Los Angeles, CA 90012
(213) 974-8118

JENNIFER HENNING
CALIFORNIA STATE ASSOCIATION
OF COUNTIES
1100 K Street, Suite 101
Sacramento, CA 95814
(916) 327-7535

Attorneys for
Amicus Curiae CSAC

**Counsel of Record*

TABLE OF CONTENTS

		Page
I.	INTERESTS OF *AMICI CURIAE*	1
II.	SUMMARY OF ARGUMENT	3
III.	ARGUMENT IN SUPPORT OF GRANTING THE PETITION	5
	THE NINTH CIRCUIT'S DECISION REFUSING TO RECOGNIZE A MEDICAL PEER REVIEW PRIVILEGE UNDERCUTS CALIFORNIA POLICY AND EVISCERATES THE LONG-ESTABLISHED PROMISE OF CONFIDENTIALITY PROVIDED UNDER CALIFORNIA LAW TO THE DETRIMENT OF STATE-WIDE HEALTH CARE	5
	1. Medical Peer Review in California	5
	2. Impact of Ninth Circuit's Decision	7
	3. Lack of Uniformity in Federal Court	8
IV.	CONCLUSION	9

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Jaffee v. Redmond, 518 U.S. 1 (1996) 8

Upjohn Co. v. United States, 449 U.S. 383 (1981) 8

STATE CASES

Matchett v. Superior Court, 40 Cal. App. 3d 623, 115 Cal.Rptr. 317 (1974) 6

West Covina Hospital v. Superior Court, 41 Cal.3d 846, 718 P. 2d 119, 226 Cal.Rptr. 132 (1986) 7

STATUTES

California Code of Regulations Title. 22, §79775, subd. (c)(4) 5

California Evidence Code section 1157, subdivision (a) 6

FEDERAL RULES

Supreme Court Rule 37.2(b) 1

BRIEF OF THE COUNTY OF LOS ANGELES, LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

This *amici curiae* brief is submitted on behalf of Los Angeles County, the Los Angeles County Sheriff's Department and the California State Association of Counties ("CSAC").[2] A motion for leave to file an *amici* brief under Supreme Court Rule 37.2(b) on behalf of CSAC is included with this brief.

I. INTERESTS OF *AMICI CURIAE*

CSAC is a non-profit corporation whose membership consists of 58 California counties. CSAC sponsors a Litigation Coordination Program, administered by the County Counsel's Association of California and overseen by the Association's Litigation Overview Committee. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties. California counties oversee the operation of approximately twenty hospitals and numerous health centers and detention facilities through the state.

The County of Los Angeles has a population of over 10.2 million people and occupies an area of approximately 4,061 square miles in southern California. The County of Los Angeles operates five acute hospitals, one multi-service

---

[2] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

ambulatory care center, six comprehensive health centers and nine health centers, and contracts with a number of community-based clinics. It is estimated that these hospitals provide approximately half of all trauma care to patients in Los Angeles County.

The Los Angeles County Sheriff's Department operates the largest municipal jail system in the United States with a daily average inmate population between 18,000 and 20,000. Its Medical Services Bureau oversees thirteen medical facilities, including the nation's largest mental health institution. On average, the custody system provides medical care to 6,000 inmates per day, and handles more than one million units of drugs per month.

Amici support the petition for writ of certiorari due to their deep concern about the impact of the Ninth Circuit's decision denying recognition of a medical peer review privilege. For many years, *amici* have relied upon the medical peer review process to advance and promote quality health care for millions of California residents. These reports have been privileged under California law for almost four decades.

But now the Ninth Circuit's decision threatens to unravel a system that has been widely accepted by hospital administrators nationwide. The government operated health care facilities under *amici's* jurisdiction are especially vulnerable to lawsuits in federal court based upon state action. This is particularly true of the Medical Services Bureau of the Los Angeles County Sheriff's Department, where it is not uncommon for inmates to file lawsuits for alleged violations of civil rights. The Ninth Circuit's refusal to recognize a federal medical peer review privilege will have a profound influence on *amici's* hospitals as it encourages

forum shopping by plaintiffs and, most significantly, discourages physicians from serving on peer review committees. Those physicians who do participate in the peer review process will be far less frank in their assessments due to fear of being drawn into a federal lawsuit. This chilling effect will stifle *amici's* ability to self-police its medical facilities and will result in a negative impact upon the quality of health care throughout California.

II. SUMMARY OF ARGUMENT

Every state in the nation has now determined that the quality of hospital health care will be elevated by shielding medical peer review reports with a degree of confidentiality. Indeed, confidentiality is absolutely essential to the effective administration of peer review committees in a medical setting because it fosters an environment of candor and receptivity. Thus, the medical peer review process encourages competence in the medical profession and promotes improvement by frankly evaluating both positive and negative aspects of hospital care. Accordingly, the Ninth Circuit's decision is out of harmony with the reasoned and experienced implementation of public policy in this country.

Petitioners' stated reasons for granting the petition are clearly presented and legally sound. *See* Pet. 6-15. The uncertainty and lack of uniformity in the federal courts is a clarion call to this Court to continue the evolution of the federal common law in the area of privilege. Moreover, the overwhelming, indeed unanimous, recognition of confidentiality of medical peer review proceedings by the 50 states should be given due consideration in finding that a federal common law privilege exists.

Amici have a particular interest in persuading this Court to grant certiorari. Medical peer review reports have been privileged under California law for more than four decades. It is well accepted in California that the medical peer review process fosters competence in the medical profession through a confidential procedure of evaluating both positive and negative aspects of health care. Long ago, the Supreme Court of California interpreted the legislative history of the privilege. It acknowledged a legislative judgment that the benefits to the quality of hospital care afforded by the privilege outweigh a plaintiffs' right to access to the reports of medical peer review committees.

The Ninth Circuit's recent decision, therefore, is contrary to California public policy. It threatens to eviscerate the privilege established over forty years ago by the California legislature. The lack of a federal peer review privilege in the Ninth Circuit discourages California's hospital staff from candid self-evaluation. The chilling effect on the medical peer review process will have a correlating negative impact upon the quality of hospital care in California. The uncertainty of the privilege in the state is now akin to no privilege at all.

In addition, the conflict between the federal and state law of privilege in California encourages forum shopping by plaintiffs and places a particularly heavy burden on public hospitals and prison medical facilities that are vulnerable to being sued in federal court. California's indigent, who often turn to public health care facilities, will suffer most from a certain decline in the quality of health care.

The uncertainty and confusion among the federal courts, as well as the conflicts between the federal circuits and states, calls out for higher review. The effect of the Ninth Circuit's refusal to recognize a medical peer review privilege goes far beyond the physicians and hospital staff involved in the peer review process. The strong public policy favoring quality health care requires intervention by this Court.

III. ARGUMENT IN SUPPORT OF GRANTING THE PETITION

THE NINTH CIRCUIT'S DECISION REFUSING TO RECOGNIZE A MEDICAL PEER REVIEW PRIVILEGE UNDERCUTS CALIFORNIA POLICY AND EVISCERATES THE LONG-ESTABLISHED PROMISE OF CONFIDENTIALITY PROVIDED UNDER CALIFORNIA LAW TO THE DETRIMENT OF STATE-WIDE HEALTH CARE.

1. Medical Peer Review in California

Amici operate public health care facilities that provide medical care for millions of patients throughout the state of California. These health facilities, clinics and correctional treatment centers are subject to state regulation similar to those in Arizona. *See* Pet. 5. Title 22 of the California Code of Regulations mandates that each facility employ a medical director, whose responsibilities include "[e]stablishing and implementing a system of peer review pursuant to written procedures." (*Cal. Code Regs.*, tit. 22, §79775, subd. (c)(4).)

No one would disagree that medical doctors should have an opportunity to discuss a patient's care and to receive recommendations from other physicians. This

practice is decidedly in a patient's best interests, as it allows doctors to benefit from the collective experience and knowledge of their colleagues. Similarly, the peer review process enhances the quality of health care as its primary purpose is to evaluate the soundness of a physician's diagnosis and treatment. Thus, medical peer review encourages competence in the medical profession and fosters improvement by evaluating both positive and negative aspects of hospital care.

Records of peer review committees have long been privileged from discovery under California law. Evidence Code section 1157, subdivision (a), first enacted in 1968, provides in pertinent part: "Neither the proceedings nor the records of organized committees of medical . . . staffs in hospitals, or of a peer review body . . . having the responsibility of evaluation and improvement of the quality of care rendered in the hospital, . . . shall be subject to discovery." California courts have explained that the immunity described in the statute "extends to, first, the proceedings, and second, the records of the described staff committees." *Matchett v. Superior Court*, 40 Cal. App. 3d 623, 628, 115 Cal.Rptr. 317 (1974).

Indeed, almost twenty years ago, the Supreme Court of California acknowledged the strong public interest served by preserving the confidentiality of the medical peer review process. The court explained that the California Legislature enacted the privilege "upon the theory that external access to peer investigations conducted by staff committees stifles candor and inhibits objectivity. It evinces a legislative judgment that the quality of in-hospital medical practice will be elevated by armoring staff inquiries with a measure of confidentiality . . . and represents a legislative choice between competing public

concerns. It embraces the goal of medical staff candor at the cost of impairing plaintiffs' access to evidence."[3] *West Covina Hospital v. Superior Court*, 41 Cal.3d 846, 853-854, 718 P. 2d 119, 123, 226 Cal.Rptr. 132, 136 (1986).

The importance of confidentiality of peer review reports on the efficient functioning of California's hospitals cannot be overstated. The California Legislature immunized peer review reports from discovery to foster an environment where medical professionals could self-police and promote quality patient care through periodic review of physicians' activities. Without such protection it is unlikely that physicians will be willing to serve on quality assurance committees, nor be willing to freely discuss the performance of physicians practicing in the hospital.

2. Impact of Ninth Circuit's Decision.

Because of the uncertainty caused by the Ninth Circuit's decision not to recognize the privilege in federal law, doctors are unlikely to participate candidly in a process that previously was vital to the improvement of health care. Without the free flow of opinions between doctors regarding patient care, hospitals will suffer and patients will suffer. Obviously, these results are contrary to the goal of the state legislature.

On the other hand, plaintiffs have an incentive to file lawsuits alleging federal claims as a device to force disclosure. Public hospitals and prison medical facilities with high

---

[3] Significantly, this balancing test would not apply in the Maricopa County lawsuit because, as pointed out by Petitioner, the facts and circumstances surrounding the inmate's death were detailed in an extensive report produced to respondents in discovery. *See* Pet. 4.

indigent patient populations will be particularly targeted for litigation in federal court on theories of state action and violation of civil rights. But no physician sitting on a medical peer review committee can predict which case may result in litigation and must assume that their communications will be disclosed. The net effect of the Ninth Circuit's decision is to undercut the policy of the State of California and eviscerate the promise of confidentiality afforded to medical peer review committees. The state privilege will be rendered meaningless. As this Court noted, "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Jaffee v. Redmond*, 518 U.S. 1, 18 (1996) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)).

Peer review is a chief evaluation function of medical staffs in all 50 states, and each state now affords the reports of peer review committees some degree of protection from disclosure. This Court has held that overwhelming state support should be considered in finding that a federal common law privilege exists. *Jaffee*, 518 U.S. at 13. *Amici* urge this Court to consider the reason and experience of the individual states regarding the issue presented.

3. Lack of Uniformity in Federal Court.

Apart from the debilitating effect of the Ninth Circuit's decision on California law, conflict exists among the federal district and appellate courts. As aptly pointed out by Petitioners, "the matter is not approached uniformly in the federal courts; this is so even though a privilege exists

in almost every state and has strong support in commentary on law." *See* Pet. 6-9.

As a result, differing standards of protection for physicians and medical peer review committees exist depending upon the hospital's geographic location. Fundamental fairness and principles of federalism dictate that hospital staffs throughout the country should not suffer differing burdens imposed by federal law.

IV. CONCLUSION

As argued by Petitioners, and supported by the foregoing additional reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

RAYMOND G. FORTNER, JR.
County Counsel
PHILIP S. MILLER
Assistant County Counsel
DORAINE F. MEYER*
Senior Deputy County Counsel
OFFICE OF THE COUNTY COUNSEL
500 West Temple Street
Los Angeles, CA 90012
(213) 974-8118

JENNIFER HENNING
CALIFORNIA STATE ASSOCIATION
OF COUNTIES
1100 K Street, Suite 101
Sacramento, CA 95814
(916) 327-7535

Attorneys for Amici Curiae

**Counsel of Record*

MOTION FILED
AUG 29 2005

(2)

No. 05-139

IN THE

Supreme Court of the United States

MARICOPA COUNTY, a public entity, and
MARICOPA COUNTY CORRECTIONAL HEALTH SERVICES,
a division of Maricopa County,

Petitioners,

v.

CAROL ANN AGSTER, personal representative of the
Estate of Charles J. Agster, III, *et al.*,

Respondents.

**On Petition for Writ of Certiorari
to the United StatesCourt of Appeals
for the Ninth Circuit**

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* AND BRIEF FOR THE AMERICAN MEDICAL ASSOCIATION AND THE ARIZONA MEDICAL ASSOCIATION IN SUPPORT OF PETITIONERS

JACK R. BIERIG*
SIDLEY AUSTIN BROWN
& WOOD LLP
Bank One Plaza
10 S. Dearborn
Chicago, Illinois 60603
(312) 853-7000

Counsel for Amici Curiae

August 29, 2005

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

IN THE

Supreme Court of the United States

No. 05-139

MARICOPA COUNTY, a public entity, and
MARICOPA COUNTY CORRECTIONAL HEALTH SERVICES,
a division of Maricopa County,

Petitioners,

v.

CAROL ANN AGSTER, personal representative of the
Estate of Charles J. Agster, III, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF THE AMERICAN MEDICAL ASSOCIATION AND THE ARIZONA MEDICAL ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, the American Medical Association ("AMA") and the Arizona Medical Association ("ArMA") hereby request leave to file the accompanying brief as *amici curiae* in support of Petitioners. The AMA and ArMA obtained the consent of the Petitioners. Respondents, however, withheld their consent to the filing of a brief by movants.

The AMA and ArMA offer this brief because the issues presented in the petition affect the interests of their member physicians and the patients whom they serve. Specifically,

the question presented by this case – whether to recognize and delimit a federal privilege for medical peer review activities that are protected from discovery by state law – is an issue of recurring importance for physicians and patients. The members of the AMA and ArMA are engaged in peer review activities and in the delivery of health care services to patients on a daily basis. The AMA and ArMA are therefore in a unique position to speak to the important public interests served by maintaining the confidentiality of medical peer review proceedings – and the undermining of such proceedings that is occurring from the refusal of federal courts to recognize a privilege for peer review proceedings conducted in good faith.

The AMA and ArMA have a vital interest in the issue presented in this case, and their views can assist the Court in deciding whether certiorari should be granted. For the foregoing reasons, the Motion of the AMA and ArMA for Leave to File a Brief as *Amici Curiae* in support of Petitioners should be granted.

Respectfully submitted,

JACK R. BIERIG*
SIDLEY AUSTIN BROWN
& WOOD LLP
Bank One Plaza
10 S. Dearborn
Chicago, Illinois 60603
(312) 853-7000

Counsel for Amici Curiae

August 29, 2005

* Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
REASONS FOR GRANTING THE PETITION	3
I. CONFIDENTIAL AND PRIVILEGED MEDICAL PEER REVIEW IS THE PRIMARY AND MOST EFFECTIVE MEANS OF ADDRESSING MEDICAL ERRORS AND OF IMPROVING THE QUALITY OF HEALTH CARE	3
II. FORTY-NINE STATE LEGISLATURES AND THE UNITED STATES CONGRESS HAVE RECOGNIZED THE COMPELLING PUBLIC INTEREST IN EFFECTIVE MEDICAL PEER REVIEW AND HAVE ENACTED STATUTES PROVIDING CONFIDENTIALITY AND PRIVILEGE PROTECTIONS	7
CONCLUSION	11

TABLE OF AUTHORITIES

CASES — Page

Jaffee v. *Redmonds*, 518 U.S. 1 (1996) 9
McClain v. *College Hosp.*, 492 A.2d 991 (1985) 8
Trammel v. *United States*, 445 U.S. 40 (1980) 9
United States v. *King*, 73 F.R.D. 103 (E.D.N.Y. 1976) 9

STATUTES

42 U.S.C. § 299b-21(7)(A) 9, 10
§ 299b-22(g)(1) 10
§ 299b-24(b)(1)(A) 9
§§ 11101-11152 6
§ 11151(9)-(10) 6
Ariz. Rev. Stat. Ann. § 36-445 8
§ 36-445 *et seq* 2
§ 36-445.01 8
§ 36-2403 ..... 2, 8

LEGISLATIVE HISTORY

S. Rep. No. 108-196 (2003) 10

SCHOLARLY AUTHORITIES

Hall, *Hospital Committee Proceedings and Reports: Their Legal Status*, 1 Am. J.L. & Med. 245 (1975) 5
K. Kohlberg, *The Medical Peer Review Privilege: A Linchpin for Patient Safety Measures*, 86 Mass. L. Rev. 157 (2002) 5
C. Morter, *The Health Care Quality Improvement Act of 1986: Will Physicians Find Peer Review More Inviting?*, 74 Va. L. Rev. 1115 (1988) 4

TABLE OF AUTHORITIES -- continued

Page

J. Pape, Note, *Physician Data Banks: The Public's Right to Know Versus the Physician's Right to Privacy*, 66 Fordham L. Rev. 975 (1997) 4

P. Scibetta, Note, *Restructuring Hospital-Physician Relations: Patient Care Quality Depends on the Health of Hospital Peer Review*, 51 U. Pitt. L. Rev. 1025 (1990) 7

OTHER AUTHORITIES

AMA Policy H-375.997, Volunatry Medical Peer Review 3, 4

Common Good, Study No. 15780, *Fear of Litigation Study: The Impact on Medicine* (2002) 5, 6

Institute of Med., *To Err Is Human: Building a Safer Health System* (L. Kohn et al. eds., 2000) 3, 8

Joint Comm'n on the Accreditation of Healthcare Orgs., *2000 Hospital Accreditation Standards* (2000) 8

L. Leape & D. Berwick, *Five Years After To Err Is Human: What Have We Learned?*, 293 JAMA 2384 (2005) 6

Owens, *Peer Review: Is Testifying Worth the Hassle?*, Med. Econ., Aug. 20, 1984 7

INTEREST OF *AMICI CURIAE*

The American Medical Association ("AMA") and the Arizona Medical Association ("ArMA") submit this brief as *amici curiae* in support of Maricopa County's petition for a writ of certiorari.[1]

The AMA, with nearly 250,000 members, is the largest professional association of physicians in the United States. Its members practice in all fields of medical specialization, in Arizona and in every other state of the nation. The objects of the AMA are to promote the science and art of medicine and the betterment of public health.

With nearly 5,000 members, ArMA is the largest professional association of physicians in Arizona. The mission of ArMA is to promote and provide leadership in the art and science of medicine, and to preserve and improve the health of all the people in Arizona by developing and maintaining the highest standards. Both the AMA and ArMA are very concerned about the impact of the decision below on the continuing viability of medical peer review in the United States and the ability of such peer review to uncover and address medical errors that can harm patients, often very seriously.

Amici seek to protect the integrity of medical peer review procedures because these procedures are the primary and

---

[1] *Amici* appear not only on their own behalves but as representatives of the Litigation Center of the American Medical Association and the State Medical Societies ("the Litigation Center"). The Litigation Center is a coalition of the AMA and the state medical societies of every state, plus the Medical Society of the District of Columbia. It was established to represent the views of organized medicine in the courts. The Litigation Center has represented the interests of physicians and of patients in courts around the country.

Pursuant to this Court's Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part. The Litigation Center provided the funding for this brief.

most effective means of addressing medical errors and of improving the quality of care provided to patients. The members of the AMA and ArMA are engaged in peer review activities and in the delivery of health care services to patients on a daily basis. *Amici* are therefore in a unique position to speak to the important public interests served by maintaining the confidentiality of medical peer review proceedings – and the undermining of such proceedings that is occurring from the refusal of federal courts to recognize a privilege for peer review proceedings conducted in good faith.

In the decision below, the Ninth Circuit held that there is no federal privilege for a mortality review conducted by the Maricopa County Correctional Health Services – even though such review is protected from disclosure by Arizona law, Ariz. Rev. Stat. § 36-445 *et seq.*, § 36-2403. That decision threatens to compromise the integrity of medical peer review procedures in the Ninth Circuit and in other Circuits which follow its holding. Without confidentiality and privilege protections, physicians cannot be expected to provide frank and critical analysis of the competence and conduct of their colleagues.

Amici do not dispute that the availability of appropriate evidence in civil cases is important. *Amici* contend, however, that the failure of the federal courts to recognize a privilege for medical peer review procedures created by state law undermines the integrity and effectiveness of those procedures. It thereby endangers the public health by compromising efforts to improve quality of care. *Amici* respectfully maintain that the safety of the public is a sufficiently compelling interest to outweigh, in this context, even the need for probative evidence in federal court proceedings.

This issue is a matter of great public importance that warrants review by the Court. *Amici* therefore respectfully urge the Court to grant the petition for a writ of certiorari to consider whether to recognize and delimit a federal privilege

for medical peer review activities that are protected from discovery by state law.

REASONS FOR GRANTING THE PETITION

I. CONFIDENTIAL AND PRIVILEGED MEDICAL PEER REVIEW IS THE PRIMARY AND MOST EFFECTIVE MEANS OF ADDRESSING MEDICAL ERRORS AND OF IMPROVING THE QUALITY OF HEALTH CARE.

Medical errors are an enormously important public policy concern. In its seminal report, *To Err Is Human*, the Institute of Medicine ("IOM") estimated that medical errors are responsible for at least 44,000 and perhaps as many as 98,000 deaths each year. See IOM, *To Err Is Human: Building a Safer Health System* 26 (L. Kohn et al. eds., 2000).[2] According to the IOM, medical errors are thus one of the ten leading causes of death, with the number of deaths in a given year attributable to medical errors exceeding the number attributable to motor vehicle accidents (43,458), breast cancer (42,297), or AIDS (16,516). *Id.* In addition to the staggering number of lives lost due to medical errors, the direct and indirect costs of medical errors are also substantial. The total national costs associated with medical errors is estimated by IOM to be between $37.6 billion and $50 billion per year. *Id.* at 27.

Medical peer review is the primary and most effective means of addressing medical errors and of improving the quality of health care. See AMA Policy H-375.997 (attached as Appendix) ("Peer review should exist to maintain and improve the quality of medical care."). The peer review

---

[2] *Amici* question the methodology that was followed in *To Err Is Human* and therefore do not endorse all of its conclusions. However, there can be no doubt that *To Err Is Human* demonstrates the important federal interest in reducing medical error, and, by general consensus, it is considered the best information available.

process enlists physicians in a collegial process of evaluating, discussing, and critiquing the competence and conduct of their peers in order to identify the root causes of patient morbidity and mortality. If deficiencies in care are discovered, recommendations are made to improve the quality of care and, where appropriate, to modify the scope of the physician's practice. The fundamental purpose of peer review is to educate physicians and thereby improve the practice of medicine, not to assess blame for particular incidents or outcomes. *Id.* ("Peer review should be an educational process for physicians to assure quality medical services.").

Typically, medical staffs of hospitals or other health care facilities establish separate committees to review particular types of cases. Consistent with the educational purposes of medical peer review, the committees are organized in a manner that allows physicians to review cases falling within their specialty or practice areas. The peer review process is uniquely valuable for assessing the quality of care provided by a physician. In fact, the specialized medical knowledge required for accurate judgment of medical care renders other forms of assessment impractical. See C. Morter, *The Health Care Quality Improvement Act of 1986: Will Physicians Find Peer Review More Inviting?*, 74 Va. L. Rev. 1115, 1118 (1988). Consequently, commentators have noted that one of the best ways of improving quality of care is to strengthen medical peer review. See J. Pape, Note, *Physician Data Banks: The Public's Right to Know Versus the Physician's Right to Privacy*, 66 Fordham L. Rev. 975, 975 (1997).

Medical peer review can be effective only if physicians engaged in review activities are assured of confidentiality and privilege protections. The essential and most beneficial aspect of medical peer review is the analysis and recommendations that are produced within peer review proceedings. The usefulness of the analysis and of the recommendations is, of course, entirely dependent upon the

willingness of the participants to provide frank, searching, and sometimes critical analysis.

If participants fail to provide this analysis, or if they moderate their comments and recommendations based on influences beyond sound medical judgment, several negative consequences will ensue. Continuing medical errors may not be adequately addressed. The practices of incompetent or impaired physicians may not be appropriately circumscribed. And the quality of care will consequently suffer.

Significantly, the efficacy of medical peer review is blunted when physicians engaged in review activities fear that their identities, comments, records, and recommendations will be disclosed. Indeed, as one commentator has noted, "curtailing the candid deliberations of these committees because of a fear of the discovery process could eventually lead to the destruction of the benefits of committee review." Hall, *Hospital Committee Proceedings and Reports: Their Legal Status*, 1 Am. J. L. & Med. 245, 267 (1975); see also K. Kohlberg, *The Medical Peer Review Privilege: A Linchpin for Patient Safety Measures*, 86 Mass. L. Rev. 157, 162 (2002) ("The erosion of the medical peer review privilege leaves physicians without adequate assurance of the confidentiality of their participation in peer review activities, thereby undermining the effectiveness of peer review. . . . Ultimately, physicians cannot be expected to participate candidly in peer review or error reporting activities if their identities, comments, records and recommendations are not afforded strict protection.").

Empirical evidence supports the conclusion that disclosure of peer review proceedings in litigation undermines the efficacy of those proceedings. Specifically, a study conducted by Harris Interactive reveals that concern about use of peer review results in litigation is cited by physicians and hospital administrators as the leading factor that discourages medical professionals from openly discussing and thinking of ways to reduce medical errors. See Common Good, Study

No. 15780, *Fear of Litigation Study: The Impact on Medicine* 10 (2002). The same study also revealed that no more than 5% of physicians, nurses, and hospital administrators think that their colleagues are very comfortable discussing medical errors with them. *Id.* See also L. Leape & D. Berwick, *Five Years After To Err Is Human: What Have We Learned?*, 293 JAMA 2384, 2387 (2005) (concluding that fear of medical malpractice liability remains a major impediment to the adoption of "a nonblaming systems-oriented approach to errors," as recommended in *To Err Is Human*).

Physicians are concerned about use of medical peer review results in litigation for several reasons. *First*, physicians fear the personal exposure that may result from participating in peer review proceedings. Personal liability is possible if a physician whose conduct has been criticized brings defamation, discrimination, or antitrust claims against the members of a peer review committee. The possibility of personal liability in these actions is an obvious deterrent to physicians asked to join peer review committees.[3]

Second, physicians are concerned that their analysis of a colleague's conduct may later be used in court against that colleague. The possibility that comments, records, and recommendations will later be used against the physician under review in a malpractice action is an obvious deterrent to providing frank and unrestrained criticism of a colleague. Peer review participants do not wish to become involuntary experts for the plaintiff in a malpractice action. Indeed, if the findings and suggestions of a peer review proceeding may

---

[3] The Health Care Quality Improvement Act of 1986 ("HCQIA"), 42 U.S.C. §§ 11101-11152, protects certain types of peer review activities from liability for damages under federal and state laws. Its scope, however, is limited to actions that challenge loss of clinical privileges or membership in professional societies. *Id.* § 11151(9)-(10). It does not apply to actions, such as in this case, that involve a retrospective evaluation of medical procedures without seeking to affect individual rights.

later be used in malpractice or other actions against the individual whose performance is being reviewed, many physicians will not serve as peer reviewers at all – or will dilute their comments in a manner that detracts from the usefulness of the process.

Third, physicians fear that disclosure of peer review materials will lead to a loss of referrals or to strained relations with colleagues. See Owens, *Peer Review: Is Testifying Worth the Hassle?*, Med. Econ., Aug. 20, 1984, at 168 (noting that 21% of physicians had lost referrals or had antagonized colleagues because of their participation in peer review procedures). The loss of referrals is an especially serious concern as an increasing number of physicians practice in referral specialties that leave them dependent on the goodwill of their colleagues. See P. Scibetta, Note, *Restructuring Hospital-Physician Relations: Patient Care Quality Depends on the Health of Hospital Peer Review*, 51 U. Pitt. L. Rev. 1025, 1034-35 (1990). Put simply, the threat of disclosure undermines the collegiality upon which effective peer review, in the interest of patients, depends.

II. FORTY-NINE STATE LEGISLATURES AND THE UNITED STATES CONGRESS HAVE RECOGNIZED THE COMPELLING PUBLIC INTEREST IN EFFECTIVE MEDICAL PEER REVIEW AND HAVE ENACTED STATUTES PROVIDING CONFIDENTIALITY AND PRIVILEGE PROTECTIONS.

It takes no great insight to see that if medical peer review proceedings are not protected from discovery, they will not be as effective. Not surprisingly, therefore, by the year 2000, forty-nine states had enacted statutes to protect medical peer review records and deliberations from discovery. See IOM,

supra, at 119 & n.* (New Jersey was the exception.).[4] Although these statutes vary in the degree of protection they afford to peer review proceedings, they each seek to promote the salutory purposes of medical peer review proceedings by protecting such proceedings from discovery.

The Arizona statute is illustrative: "The governing body of each licensed hospital . . . shall require that physicians . . . review the professional practices within the hospital or center *for the purpose of reducing morbidity or mortality and for the improvement of all care of patients provided in the institution.*" Ariz. Rev. Stat. § 36-445 (emphasis added). "All proceedings, records and materials prepared in connection with the reviews . . . are confidential and are not subject to discovery. . . ." *Id.* § 36-445.01. See also *id.* § 36-2403. The Joint Commission on the Accreditation of Healthcare Organizations ("JCAHO"), the leading hospital accreditation body in the United States, has also recognized that physicians are in the best position to evaluate the quality of medical care provided by other physicians. JCAHO requires physicians to participate in efforts to measure outcomes and processes, and to evaluate "individuals with clinical privileges whose performance is questioned as a result of the measurement and assessment activities." JCAHO, *2000 Hospital Accreditation Standards* 303 (2000). The policy underlying the JCAHO standards is "to improve the quality of care provided to the public." *Id.* at ii.

State laws protecting peer review are, however, of little value if federal courts do not recognize a federal privilege. A physician contemplating participation on a peer review committee or determining what position to take in the review of a specific incident cannot know whether litigation in which the results of the peer review proceeding will be sought will

---

[4] However, the New Jersey courts have recognized a common law "self-critical analysis" privilege for peer review materials. *See, e.g., McClain* v. *College Hosp.*, 492 A.2d 991, 998 (N.J. 1985).

take place in state court or in federal court. The possibility that it will occur in a federal court that refuses to recognize the privilege is likely to affect the physician's judgment.

Principles of comity require that federal courts recognize the privileges established by state statute "where this can be accomplished at no substantial cost to federal substantive and procedural policy." *United States* v. *King*, 73 F.R.D. 103, 105 (E.D.N.Y. 1976). This Court has previously deferred to state trends in deciding important privilege issues. Compare *Trammel* v. *United States*, 445 U.S. 40, 49-53 (1980) (narrowing privilege), with *Jaffee* v. *Redmonds*, 518 U.S. 1, 13 (1996) (creating new privilege). *Amici* urge the Court to recognize the impressive consensus among the states that a compelling public interest in effective medical peer review procedures requires confidentiality and privilege protections.

Moreover, Congress' enactment of the Patient Safety and Quality Improvement Act of 2005 ("the Act") demonstrates Congressional recognition of the importance of confidentiality and privilege protections for medical peer review proceedings. The Act creates a new system of voluntary medical error reporting that encourages health care providers to report medical errors to a centralized database where researchers will analyze the information and provide recommendations for improving patient safety. The Act establishes "Patient Safety Organizations" as the means of conducting these "activities that are to improve patient safety and the quality of health care delivery." 42 U.S.C. § 299b-24(b)(1)(A). The efforts of Patient Safety Organizations are complementary to those of medical peer review committees: Patient Safety Organizations will do on a national and system-wide level what medical peer review committees do on a local and individual level.

Significantly, the Act provides privilege and confidentiality protections for all "patient safety work product" used to conduct patient safety activities. *Id.* § 299b-21(7)(A). Patient safety work product is broadly defined to include "any data,

reports, records, memoranda, analyses (such as root cause analyses), or written or oral statements" that are "assembled or developed" by a provider or a patient safety organization for "the conduct of patient safety activities." *Id.* By including broad confidentiality and privilege protections in the Act, Congress acknowledged that medical error reporting – and medical peer review activities – are compromised when there is a threat of disclosure in discovery proceedings and when medical peer reviewers are subject to potential liability. See S. Rep. No. 108-196, at 4 (2003) ("The purpose of this legislation is to encourage a 'culture of safety' and quality in the U.S. health care system by providing for broad confidentiality and legal protections of information collected and reported voluntarily for the purposes of improving the quality of medical care and patient safety.").

In addition, the Act addresses the need for confidentiality and privilege protections for state mandated and institutionally mandated medical peer review proceedings by providing that the Act does not "limit the application of other Federal, State, or local laws that provide greater privilege or confidentiality protections than the privilege and confidentiality protections provided for in this section." 42 U.S.C. § 299b-22(g)(1). This language ensures that confidentiality and privilege protections provided by state statutes are not limited by the Act, a provision that further demonstrates Congress' recognition that these protections are essential to medical peer review activities.

CONCLUSION

There is a compelling federal interest in respecting state laws that protect medical peer review proceedings from discovery in litigation. These laws safeguard the efficacy of the most effective mechanism to address medical errors. The decision below undermines this important federal interest by making the confidentiality of peer review records depend on whether they are sought in federal or in state court – something that physicians who are asked to conduct peer review proceedings cannot know at the time that they decide whether to participate or at the time that they determine what to include in the report. For the reasons set forth above, this Court should grant the petition for certiorari to consider whether to recognize and delimit a federal privilege for medical peer review proceedings protected by state law.

Respectfully submitted,

JACK R. BIERIG*
SIDLEY AUSTIN BROWN
& WOOD LLP
Bank One Plaza
10 S. Dearborn
Chicago, Illinois 60603
(312) 853-7000

Counsel for Amici Curiae

August 29, 2005

* Counsel of Record

APPENDIX

H-375.997 VOLUNTARY MEDICAL PEER REVIEW

Our AMA advocates the following principles for voluntary medical peer review: (1) Medical peer review is an organized effort to evaluate and analyze medical care services delivered to patients and to assure the quality and appropriateness of these services. Peer review should exist to maintain and improve the quality of medical care.

(2) Medical peer review should be a local process.

(3) Physicians should be ultimately responsible for all peer review of medical care.

(4) Physicians involved in peer review should be representatives of the medical community; participation should be structured to maximize the involvement of the medical community. Any peer review process should provide for consideration of the views of individual physicians or groups of physicians or institutions under review..

(5) Peer review evaluations should be based on appropriateness, medical necessity and efficiency of services to assure quality medical care.

(6) Any system of medical peer review should have established procedures.

(7) Peer review of medical practice and the patterns of medical practice of individual physicians, groups of physicians, and physicians within institutions should be an ongoing process of assessment and evaluation.

(8) Peer review should be an educational process for physicians to assure quality medical services.

(9) Any peer review process should protect the confidentiality of medical information obtained and used in conducting peer review. (CMS Rep. A, I-81; Reaffirmed: CLRPD Rep. F, I-91; Reaffirmation I-98; Reaffirmed: BOT Rep. 8, I-01)

(4)

No. 05-139

Supreme Court, U.S.
FILED
SEP 8 - 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MARICOPA COUNTY, a public entity, and
MARICOPA COUNTY CORRECTIONAL HEALTH SERVICES,
a division of Maricopa County,
Petitioners,

v.

CAROL ANN AGSTER, personal representative of the
Estate of Charles J. Agster, III, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

DUANE A. OLSON *
DANIEL P. JANTSCH
MICHAEL D. WOLVER
OLSON, JANTSCH & BAKKER, P.A.
7243 North 16th Street
Phoenix, Arizona 85020
(602) 861-2705

JOSEPH D. KEARNEY
APPELLATE CONSULTING GROUP
Post Office Box 2145
Milwaukee, Wisconsin 53201
(414) 332-0966

* Counsel of Record

Attorneys for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

IN THE
SUPREME COURT OF THE UNITED STATES

No. 05-139

PETITIONERS' REPLY

Petitioners respectfully submit this reply brief in support of the petition for certiorari.* The amicus curiae briefs of the American Medical Association and various California counties underscore the importance of this Court's review of

---

* The petition for certiorari was timely filed on July 25, 2005, seeking review of the Ninth Circuit's April 28, 2005 decision. On August 29, 2005—the same day as respondents filed their brief in opposition and the American Medical Association and the County of Los Angeles submitted amicus curiae briefs in support—the Ninth Circuit, *sua sponte*, withdrew its April 28, 2005 opinion and substituted a new opinion in its place. The judgment affirming the district court's order was unchanged, and the court of appeals' analysis of the medical peer review privilege, the subject of the question presented in this Court, remained the same. The difference in the opinion is that the Ninth Circuit refined its analysis of the appealability of the district court's order under 28 U.S.C. § 1291, *see* Pet. 4-5 and Pet. App. 3a-4a, although the court's bottom line even on this matter did not change.

After consulting with the Office of the Clerk of the Supreme Court, petitioners determined that it is not necessary to file an entirely new petition for certiorari and that this reply brief is an appropriate mechanism for informing the Court of the change in the opinion below (the judgment remains the same); after all, although it exists here, even a final judgment is not required for a writ of certiorari to a federal court of appeals (as opposed to situations involving state-court decisions). *Compare* 28 U.S.C. § 1254(1) (certiorari may be granted to review a case in the federal court of appeals "before or after rendition of judgment or decree") *with* 28 U.S.C. § 1257(a) (certiorari to state courts limited to "[f]inal judgments or decrees"). The brief appendix at the end of this reply specifies the change in the Ninth Circuit's opinion.

the Ninth Circuit's decision. By contrast, respondents' suggestions do not adequately support denying the petition concerning the medical peer review privilege which has been recognized throughout the state courts.

1. Respondents' fundamental assertion, phrased a variety of ways, is that the question of a federal medical peer review privilege is insufficiently controverted to warrant this Court's review. This claim does not withstand scrutiny.

There are two conflicts that respondents cannot evade. The first is that federal law as stated by the Ninth Circuit here (and a number of other federal courts of appeals, though not all, *see* Pet. 7-8) is incongruent with the law of essentially every State. Medical peer reviews are privileged in state courts, but fully discoverable in many federal courts. As the amicus curiae brief submitted on behalf of California counties reflects, the result of this disparity will be effectively to eliminate the benefits of the state-law privilege in many of the numerous situations where a federal-law claim can be joined with a state-law tort claim.

Even apart from the importance of resolving this discrepancy so that rejection of the privilege in some federal courts does not vitiate its recognition in state courts, *cf. Jaffee v. Redmond*, 518 U.S. 1, 13 (1996) (explaining recognition of psychotherapist-patient privilege in part on ground that "[d]enial of the federal privilege . . . would frustrate the purposes of the state legislation that was enacted to foster these confidential communications"), this federal-state conflict supports review. The actions of the various States in recognizing a medical peer review privilege make it increasingly difficult under Federal Rule of Evidence 501 to maintain that "reason and experience" support the categorical denial of the privilege in federal-court cases involving at least one federal claim.

The other conflict is in the federal district courts—the sole federal forum for the resolution of almost all privilege (and other discovery) questions. At one point, respondents appear to deny the existence of *any* such division of authority, *see* Pet. 9, but ultimately settle upon the claim that decisions recognizing a medical peer review privilege "are considered anomalies and against the weight of federal authority," Pet. 14. This is simply incorrect. As petitioners have demonstrated, there is a deep and persistent division among the federal district courts. *Compare* Pet. 9 n.2 (citing cases recognizing a federal medical peer review privilege) *with id.* n.3 (citing cases ruling to the contrary).

Nor can it accurately be said—despite respondents' attempt—that the cases recognizing a privilege reflect some superannuated view. To be sure, the leading case on the matter, *Bredice v. Doctors Hospital, Inc.*, 50 F.R.D. 249 (D.D.C. 1970), *aff'd mem.*, 479 F.2d 920 (D.C. Cir. 1973), was decided some thirty-five years ago. In respondents' curious view, because it thus preceded Congress's enactment of Federal Rule of Evidence 501 in 1975 (both dates having been previously noted, *see* Pet. 11, 14), *Bredice* cannot form the basis for decisions today. *See* Br. Opp. 2, 11, 15 (emphasizing that *Bredice* was decided before adoption of Fed. R. Evid. 501 and stating that this makes the case "outdated" and "inappropriat[e]" for the Fifth Circuit to rely upon it) (quoted material at 2). This is nonsense; such a decision date is entirely consistent with (and perhaps even supportive of) the analysis based on "reason and experience" that Rule 501 requires.

But, more fundamentally, respondents' analysis would be news to the federal district courts. As demonstrated in the petition, numerous cases in the federal courts look to *Bredice* as the leading case. They do this even where they rule to the contrary and reject a privilege. *See* Pet. 9 n.3 (citing cases and parenthetically noting discussion of *Bredice*). And they

certainly do it where they recognize the privilege. *See id.* n.2 (same). There is no shortage of either sort of case. Respondents further do not contest that the rule of *Bredice* constitutes the law of the D.C. Circuit, *see* Pet. 8.

Although respondents thus seek to minimize the importance of, or even to deny, the existence of important conflicts between federal and state law and within the lower federal courts, they claim throughout the response that to recognize a privilege here would *create* a conflict: with Congress.

The fact that Congress in particular circumstances (where the federal government itself has had some peculiarly important interest at stake) has adopted statutory privileges, *see* Br. Opp. 13 (citing Department of Defense, Veterans Affairs, Coast Guard, Social Security statutes), does not support denying a privilege here. Congress made clear, in replacing the proposed Federal Rule of Evidence 501 (which would have prescribed nine specific privileges) with its own version in 1975 (which still exists today), that it wanted the identification of privileges in federal civil litigation typically left to a common-law process. *See generally* Pet. 11.

The Health Care Quality Improvement Act of 1986 (HCQIA) did not reflect some rejection of this general rule whenever a medical peer review issue arises, as respondents seem to suggest. *See* Br. Opp. 7-11. At most, the HCQIA could be argued to support denial of a privilege in cases covered by the Act—but, as amicus AMA observes, the HCQIA does not apply to this action. *See* AMA Amicus Br. 6 n.3.

The most directly relevant precedent, therefore, is not *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990), which both the Ninth Circuit and respondents here invoke in the context of discussing the HCQIA, but *Jaffee v. Redmond*, 518 U.S. 1 (1996). In *University of Pennsylvania*, it appears that no State recognized the sort of academic-criticism

privilege that was sought. By contrast, in both *Jaffee* (of which respondents are able to muster up only one citation despite its prominence in the petition) and this case, the law applicable in every state court recognized the privilege whose recognition was sought in the federal action. That alone—even leaving aside for a moment the support for the privilege in commentary on law to which respondents offer no response and the division in the lower federal courts—is a compelling basis for review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DUANE A. OLSON *
DANIEL P. JANTSCH
MICHAEL D. WOLVER
OLSON, JANTSCH & BAKKER, P.A.
7243 North 16th Street
Phoenix, Arizona 85020
(602) 861-2705

JOSEPH D. KEARNEY
APPELLATE CONSULTING GROUP
Post Office Box 2145
Milwaukee, Wisconsin 53201
(414) 332-0966

* Counsel of Record

Attorneys for Petitioners

APPENDIX

[On August 29, 2005, the Ninth Circuit *sua sponte* withdrew its April 28, 2005 decision, set forth as Appendix A in the petition for certiorari, and replaced it with a new opinion, as described at p. 1 note * of the foregoing reply brief.]

[With one exception, the changes within the opinion are all in the "*Jurisdiction*" portion of the "ANALYSIS" section. *See* Pet. App. 3a-4a. (The exception is that the Ninth Circuit corrected the typographical error previously noted in the fourth line of the first full paragraph on Pet. App. 5a, such that "patient case [*sic*]" in that line should now simply read "patient care".) The first paragraph (on Pet. App. 3a) of the "*Jurisdiction*" portion is unchanged; in place of the second and only other paragraph in that portion (which appears at the top of Pet. App. 4a), the following three paragraphs now appear:]

Our circuit has not resolved the general question of "whether a discovery order disposing of an asserted claim of privilege could be independently appealed under the collateral order doctrine of *Cohen*[.]" *United States v. Fernandez*, 231 F.3d 1240, 1245 n. 4 (9th Cir. 2000). We need not do so here; it suffices to conclude that under the specific circumstances of this case, including the nature and importance of the privilege at issue, jurisdiction lies.

The issue of the production of the mortality review is conclusively resolved, and the statutory grant of the claimed privilege by Arizona and other states attests to its importance. The trickier question, as we recognized in a related context in *Bittaker v. Woodford*, 331 F.3d 715, 718 (9th Cir. 2003) (en banc), is whether the issue at stake will be effectively unreviewable after a final judgment. As we stated in *Bittaker*, the district court's order regarding the privilege is "reviewable on appeal from the final judgment, no matter

who wins below on the merits," and "at that time we will know much more about the practical effect of the order, if any." *Id.* at 717. Further, "if [plaintiffs are] unsuccessful in any of [their] claims, and no retrial is necessary, the order would become irrelevant for all practical purposes." *Id.* A similar result would also follow if, upon appeal after a final judgment, we assumed the impropriety of the discovery order but found the error harmless.

However, we conclude, as we did in *Bittaker*, that the decision is appealable now "because significant strategic decisions turn on its validity," and "review after final judgment may therefore come too late." *Id.* at 717-718. Once "the cat is already out of the bag," it may not be possible to get it back in. *See id.* (quoting *In re Ford Motor Co.*, 110 F.3d 954, 963 (3d Cir. 1997)). Even if a new trial were ordered at which the material found to be privileged was not admissible, it might be impossible to undo the effects of the disclosure with regard to the information in plaintiffs' hands and its effect on their trial strategy. Jurisdiction exists to decide the dispute now.